Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM 1996

NORTH BELLE VERNON BOROUGH; FAYETTE CITY BOROUGH; WASHINGTON TOWNSHIP; FRANK E. MONACK, JR., individually and in his capacity as OFFICER OF WASHINGTON TOWNSHIP; OFFICER RAYMOND MOODY, individually and in his capacity as OFFICER FOR FAYETTE CITY BOROUGH; OFFICER DARHL SNYDER, individually and in his capacity as OFFICER FOR NORTH BELLE VERNON BOROUGH,

Petitioners,

v.

FRANCES E. LIVINGSTONE and JOSEPH A. LIVINGSTONE, her husband,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals exceed the mandate of Town of Newton v. Rumery in holding that "the public interest" prevents enforcement of a criminal defendant's covenant not to sue police officers and their municipal employers for alleged deprivation of civil or constitutional rights, entered in exchange for a prosecutor's agreement to permit the entry of judgment of acquittal in favor of the criminal defendant, unless before concluding the agreement, the prosecutor determined that the criminal defendant's civil rights claims against police or other prosecuting authorities were marginal or frivolous?

II. Where defendants have proved by a preponderance of the evidence that plaintiffs voluntarily entered into a judicially supervised release/dismissal agreement, have defendants established plaintiffs' valid, enforceable release of civil liability?

III. Does the Court of Appeals' holding, that the party seeking to enforce a judicially supervised release/dismissal agreement in a civil action must discharge its burden of proof by "clear and convincing" evidence, conflict with this Court's precedent?

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 91 F.3d 515 and appears at Appendix 1A-50A. The opinion of the United States District Court for the Western District of Pennsylvania is not reported, and appears at Appendix 52A-59A. The Court of Appeals for the Third Circuit in banc previously considered this case; its decision is reported at 12 F.2d 1205, and appears at Appendix 77A-98A. Additional unreported opinions of the District Court, and relevant Reports and Recommendations filed by Magistrate Judges, appear in reverse chronological order in the Appendix, at 60A-75A and 99A-109A.

STATEMENT OF JURISDICTION

Petitioners seek this Court's review of the judgment of the United States Court of Appeals for the Third Circuit entered July 31, 1996. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents filed suit against Petitioners under the provisions of 42 U.S.C. §1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

> the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondents claimed violations of the Fourth and Fourteenth Amendments to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, and against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 14, 1991, Respondents Frances and Joseph Livingstone filed suit in the United States District Court for the Western District of Pennsylvania, invoking the District Court's jurisdiction under 28 U.S.C. §1343.

Respondents sought damages for injuries allegedly sustained by Frances Livingstone on January 12, 1989 during a confrontation in her home with police officers.

On that night, the Livingstones' daughter Carrie reported to Petitioner Frank Monack, a Washington Township, Pennsylvania police officer, that her father had struck her and that her parents were holding her son at the home she shared with them, without her consent. Officer Monack requested assistance under an intermunicipal police cooperation agreement; Petitioners Dahrl Snyder, a North Belle Vernon Borough police officer and Raymond Moody, a Fayette City Borough officer, responded to his call.

The witnesses agreed that Officer Monack and Snyder entered the home, to which Carrie had returned, to retrieve the the child. Mrs. Livingstone retreated to a bedroom with the child; she ignored the officers' directions to come out and she locked the door. Officer Monack picked the lock, and when he opened the door, Mrs. Livingstone struck him with a metal object, and barricaded the door with furniture. The officers did enter the room, and attempted to restrain Mrs. Livingstone, while she struggled violently. Ultimately, they carried her from the house, but she was not taken into custody that night.

Within hours of the incident, petitioner Monack filed a criminal complaint against Frances Livingstone, charging disorderly conduct, assault, terroristic threats, resisting arrest and interference with the custody of children. She was held for court on charges of disorderly conduct, resisting arrest, simple assault and interference with the custody of children, but she was not incarcerated pending trial.

Before her criminal trial began, Mrs. Livingstone spoke with a number of attorneys, including the director of the American Civil Liberties Union's Pittsburgh chapter, about the possibility of filing suit against the officers. She

also complained to public officials, seeking to pursue charges against one or more of the officers. The Federal Bureau of Investigation conducted an investigation and submitted a report to the United States Department of Justice, Civil Rights Division. Division attorneys informed Mrs. Livingstone, shortly before her criminal trial commenced, that no "prosecutable violation" of criminal civil rights statutes had occurred. (No.92-3288: 2171a)[1]

Mrs. Livingstone proceeded to trial in the Court of Common Pleas of Fayette County, Pennsylvania. She was represented by Thomas R. Ceraso, Esquire, who had been in practice for 35 years, specializing in criminal work. He testified that he had been involved in the defense of about three dozen criminal cases that were resolved by the negotiation of release/dismissal agreements. After the Commonwealth rested its case, the court granted defense counsel's demurrer to the charge of interference with custody of children, but denied the motion on the remaining charges. The defense then offered the testimony of Respondent Joseph Livingstone, and cross-examination of the second defense witness was under way when proceedings ended for the second day.

Before testimony resumed, the parties reached an agreement: Mrs. Livingstone's counsel would move for judgment of acquittal, without opposition from the prosecutor, and Respondents would release the officers and municipalities from any civil liability. Mrs. Livingstone was to submit certain bills for medical expenses and repairs to her home to Attorney Ceraso, who would forward them to Washington Township for payment. (699a-714a) Counsel discussed the terms of the proposed agreement with Mr. and Mrs. Livingstone, explaining that if they agreed to the terms,

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[1] Page numbers followed by lower case letters designate pages of the Appendices filed in the Court of Appeals for the Third Circuit.

they would be waiving all claims arising from Mrs. Livingstone's encounter with police officers. Respondents agreed to release the officers and municipalities involved from civil liability. The terms of the release/dismissal agreement were recited by Attorney Ceraso on the record, in Respondents' presence, before the judge presiding at Mrs. Livingstone's criminal trial. (Appendix 110A-115A) Then on Mr. Ceraso's motion, the court entered judgment of acquittal for Mrs. Livingstone and discharged the jury.

In their complaint instituting this suit, Respondents placed this agreement at issue (21a). All Petitioners asserted the binding effect of the agreement, in motions for summary judgment. Respondents asserted that there was no agreement that they would not pursue civil remedies. They argued that the agreement was never reduced to writing, no money changed hands (Mrs. Livingstone never submitted bills to her attorney for payment) and the agreement was never formally ratified by the municipalities. The District Court granted the motions, on the recommendation of the magistrate judge. (Appendix 99A-109A).

The Court of Appeals vacated the order granting summary judgment. The court found material issues of fact remained on the question whether Respondents made a deliberate, informed and voluntary waiver of their rights to file civil actions against Petitioners. (Appendix 79A)

On remand, Respondents sought summary judgment on the issue of the validity of the agreement. (354a) In response, Petitioners filed cross-motions for summary judgment on that issue. The District Court determined that while the voluntariness requirement of the Rumery analysis remained an issue for trial, the remaining Rumery requirements would be appropriate for summary judgment. The court found no evidence of prosecutorial overreaching. Specifically, the court cited the prosecutor's affidavit describing the circumstances of the agreement. Among other

factors, the prosecutor noted that the criminal trial had pitted members of the Livingstone family as opposing witnesses, and additional testimony would undermine the relationship that the family apparently had rebuilt in the year since the incident. He also noted that the agreement called for the payment of bills for damages the Livingstones claimed to have sustained. The District Court found no evidence that the prosecutor's motive for participating in the agreement was improper, and found that "[i]n the absence of evidence that the motivation was improper, we may accept his explanation". (Appendix at 58A)

The case proceeded to trial on the issues raised by the "voluntariness" prong of the Rumery test.[2] Petitioners offered the testimony of the officers and Attorney Ceraso. The officers acknowledged that Petitioner Monack applied a stun gun to Mrs. Livingstone's clothed leg, in an effort to subdue her; otherwise, their account of the struggle and Mrs. Livingstone's account conflicted.

Mrs. Livingstone described in detail the assault she alleged was perpetrated by Officer Monack with the help of Officer Snyder, and the injuries she sustained. She said that Officer Monack applied a stun gun to her thigh, and then "shov[ed] the stun gun up between" her legs, saying "you want a thrill, I'll give you a thrill" (Trial transcript, vol.III, p.47-100) During cross-examination of Attorney Ceraso, Respondents offered a report of an emergency room examination of Mrs. Livingstone, that Respondents suggested corroborated Mrs. Livingstone's account of her injuries. The District Court admitted the reports into evidence on counsel's proffer that

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[2] Had the jury found that no agreement was reached or that the Livingstones had not voluntarily and deliberately entered into the agreement, then the parties would have proceeded to trial on the merits of the Livingstones' federal and remaining state law claims.

the physician would be available as a witness.[3] (768-772a)

Respondents' counsel argued to the jury that the jury was required to find that all three municipalities were to benefit from and were bound by the agreement, in order to find for defendants. The District Court instructed the jury accordingly. (10b,22b) On the Rumery issue, the District Court instructed the jury that defendants/petitioners carried the burden of proving that plaintiffs/respondents agreed to release defendants from civil liability in return for the entry of judgment of acquittal in favor of plaintiff Frances Livingstone. The court instructed that defendants must prove their case by a preponderance of the evidence, described as "evidence which points to a certain conclusion and appears to you to be more credible and probable than evidence to the contrary". The court told the jury to determine whether plaintiffs reached an agreement with defendants, and whether plaintiffs made a deliberate, informed and voluntary waiver of their rights to pursue civil actions against the defendants.

The court told the jury to consider twelve factors in its evaluation of the validity of plaintiffs' waiver, including the clarity of the agreement, plaintiffs' education, the amount of time plaintiffs had to consider the terms of the alleged agreement before responding, whether plaintiffs were advised by counsel, whether plaintiffs had the opportunity to negotiate terms and conditions of the alleged agreement, and whether plaintiffs were subjected to coercion. (15b-22b)

The jury determined that Respondents had made a voluntary, deliberate and informed waiver of their rights to pursue civil actions against Petitioners.

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[3] The physician who conducted the examination was not called as a witness. The report was admitted over Petitioners' objection that the evidence was irrelevant. (770a)

The Court of Appeals vacated the judgment, and remanded for proceedings as follows:

a. The parties must brief the question whether the Livingstones had undertaken to negotiate toward a release with North Belle Vernon Borough and Fayette City Borough, or that the Livingstones merely made an offer to those two boroughs, and the court must resolve that issue.

b. The parties must address:

> whether Heneks [the prosecutor] made a determination that the Livingstones' civil rights claims were marginal or frivolous, and, if so, on what basis he did so; (2) whether Heneks knew or should have known of the foregoing evidence of police misconduct; and (3) if Heneks did know, or should have known, of that evidence, whether other facts available to Heneks in some way undercut it...[D]efendants would have to demonstrate that Heneks was aware of other evidence that rendered the foregoing evidence of police misconduct fundamentally untrustworthy.

(Appendix 27A-28A) Ultimately, the district court would have to decide whether enforcement of the agreement would be compatible with Rumery and Third Circuit precedent, "notwithstanding that the evidence of misconduct was not known, or reasonably knowable, by the prosecutor at the time the prosecutor entered into what might appear, in retrospect, to be an improvident agreement." (Appendix 28A)

c. If the court were to rule in Petitioners' favor on the foregoing issues, then the parties will proceed to retrial on the Rumery

voluntariness issue, with Petitioners obliged to prove voluntariness by clear and convincing evidence. The jury also must be instructed to determine whether Petitioners proved that the prosecutor's stated reasons for participating in the agreement were his actual reasons.

REASONS FOR GRANTING THE WRIT

A. This Court should grant certiorari because the Court of Appeals for the Third Circuit has crafted a per se rule, in conflict with Town of Newton v. Rumery, and decisions of other Circuits, that release/dismissal agreements are invalid unless the prosecutor correctly determined that the civil claims at issue were "marginal or frivolous".

Under the Court of Appeals' ruling in this case, before participating in a release/dismissal agreement, the prosecutor is obliged to evaluate the merits of the criminal defendant's allegations of civil rights violations. The prosecutor must conclude that the defendant's claim is frivolous. Furthermore, the prosecutor must be correct in his evaluation; under the Court of Appeals' holding, the prosecutor's "reasonable belief" that the claims were marginal would not suffice to establish that the release/dismissal agreement was in the public interest. The party asserting the validity of the release must prove that in fact, the criminal defendant's civil claims were marginal or frivolous. (Appendix 23A-28A).

In Town of Newton v. Rumery, 480 U.S. 386 (1987), this Court applied federal common law to determine the validity of a release of Section 1983 claims, negotiated in exchange for the dismissal of criminal charges. The Court held:

> [A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.

480 U.S. 386, 392. This Court established that a "release/dismissal" agreement is enforceable if it was

voluntary, if there is no evidence of prosecutorial misconduct, and if enforcement of the agreement would not adversely affect the relevant public interests. Id., at 396.

In this Court's view, the rights released by the criminal defendant Rumery were private rights.

> Rumery had no public duty to institute a §1983 action merely to further the public's interest in revealing police misconduct...Thus, we hesitate to elevate more diffused public interests above Rumery's considered decision that he would benefit personally from the agreement.

Id. at 394.

Simply stated, Rumery's surrender of his statutory remedy under Section 1983 did not have a significant impact on the public at large. Id., 394-395. Nor did the Court find a sufficient public interest that necessarily would be injured by the enforcement of release/dismissal agreements, to warrant the declaration of such agreements invalid per se. On the contrary, the Court believed that such agreements may further legitimate public interests. Id., at 396, 398 (O'Connor, concurring). Finally, the Court declined to presume that prosecutorial overreaching characterizes release-dismissal agreements.

In seeking to guarantee that release/dismissal agreements are free from prosecutorial overreaching, the Third Circuit has taken an approach that requires the prosecutor to discharge a responsibility that he or she may be ill-equipped to handle: the accurate evaluation of the relative merit of a civil claim. Furthermore, the Court's analysis presumes misconduct on the part of the prosecutor who participates in a release/dismissal agreement, unless the claim is marginal or frivolous. The parties asserting the validity of

the agreement must prove that the prosecutor in fact considered the marginal or frivolous nature of the civil rights claims. Furthermore, the parties must prove to the factfinder, by clear and convincing evidence, that the prosecutor "properly regarded" those claims as marginal or frivolous.

In Rumery, the Court noted, of course, that some Section 1983 claims are meritless. But the Court did not determine that Rumery's own claim was meritless, in concluding that the agreement was not the product of prosecutorial overreaching. Petitioners do not dispute that in some cases, courts may deem the potential merit of the claim to be a relevant factor in evaluating the validity of these releases. Rather, they challenge the wisdom of a per se rule, where Rumery has rejected that approach. No other Court of Appeals has found it necessary or appropriate to establish a "bright line" test to govern the evaluation of release/dismissal agreements.

Indeed, the extent of the injury apparently at issue--severe burns to the criminal defendant that he suffered while in custody--did not prevent the Fifth Circuit from concluding, under the Rumery test, that the release/dismissal agreement was enforceable. Berry v. Peterson, 887 F.2d 635 (5th Cir. 1989). In Hill v. City of Cleveland, 12 F.3d 575 (6th Cir. 1993), the court's careful analysis of the claim of prosecutorial overreaching omitted any discussion of the injury sustained by Hill or the potential merit of the civil rights claim. Rather, the court properly emphasized the timing of the criminal charges of resisting arrest and disorderly conduct, the fact that motions challenging the sufficiency of the evidence had been denied before the release was negotiated, and the fact that the release was supervised by a judge who was familiar with the charges against Hill.

The Third Circuit panel in this case relied on Cain v. Darby Borough, 7 F.3d 377 (3d Cir. 1993) (in banc), cert. denied, 114 S.Ct. 1303 (1994), for the proposition that the prosecutor must conclude that the civil claim at issue is frivolous. In Cain, the court considered the release in the context of a policy of the District Attorney's Office applicable to defendants otherwise eligible for its "Accelerative Rehabilitative Disposition" program. If the police might have faced civil liability, the District Attorney would not approve the criminal defendant's application for admission to the pre-trial "probation without verdict" program unless the defendant first executed a release-dismissal agreement. In that context, the court's articulation of a requirement that the prosecutor consider the merit of the civil claims at issue may be understood, particularly so in reaction to the prosecutor's efforts to defend the policy:

> The District Attorney rationalizes his policy on the ground that he and the police have an interest in avoiding "the needless litigation, the ofttimes frivolous actions that are brought and to resolve the entire matter at the time of the ARD hearing in an amicable fashion.

Id., at 383. The Court of Appeals' application of the Cain principle under the circumstances of this case, however, when coupled with its new declaration of the burden of proof, effectively renders release/dismissal agreements unenforceable in the Third Circuit.

B. **The Court of Appeals' resolution of an issue of first impression among the Courts of Appeal, that Petitioners must prove the validity of the release/dismissal agreement by clear and convincing evidence, conflicts with this Court's precedent.**

In Rumery, this Court did not have occasion to address the question of the burden of proof of the party seeking to enforce a release/dismissal agreement. The other Courts of Appeals have not squarely addressed the issue. The Third Circuit's holding appears to be in conflict, however, with this Court's precedent on the burden of proof to be applied in civil cases.

The Court of Appeals acknowledged this Court's precedent.

> [I]n civil actions between private litigants, a standard of proof greater than one of a preponderance of the evidence will only apply in cases in which "'particularly important individual interests or rights are at stake.'" Grogan v. Garner, 498 U.S. 279, 286 (1991) (quoting Herman & MacLean v. Huddleston, 459 U.S. 375, 389-90 (1983)].

(Appendix 33A). The Court of Appeals determined, however, that the enforcement of "oral" release-dismissal agreements implicates "important individual interests or rights"; Id.[4]

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[4] The Court's characterization of the agreement as an "oral" agreement fails to reflect that the terms of the agreement were declared on the record by counsel for the criminal defendant, in the presence of Respondents and the judge presiding at the criminal trial.

The "particularly important individual interests or rights" of which this Court spoke in Grogan and Huddleston included proceedings to terminate parental rights[5],

involuntary commitment proceedings[6]; and deportation proceedings[7].

> By contrast, imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence. See, e.g., United States v. Regan, 232 U.S. 37, 48-49, 34 S.Ct. 213, 217, 58 L.Ed. 494 (1914) (proof by a preponderance of the evidence suffices in civil suits involving proof of acts that expose a party to a criminal prosecution).

Grogan, 103 S.Ct. at 690.

In a section 1983 suit, the plaintiff pursues a statutory remedy for alleged violations of his constitutional rights. This Court recognized in Rumery, of course, that the "vindication of constitutional rights and the exposure of official misconduct" are concerns implicated by Section 1983 suits; 480 U.S. at 395. In criminal prosecutions, however, where the State claims the defendant waived constitutional rights, the State's burden of proof on the issue is "proof by a preponderance of the evidence." Colorado v. Connelly, 479 U.S. 157, 169 (1986).

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[5] Santosky v. Kramer, 455 U.S. 745 (1982).

[6] Addington v. Texas, 441 U.S. 418 (1979).

[7] Woodby v. INS, 385 U.S. 276 (1966).

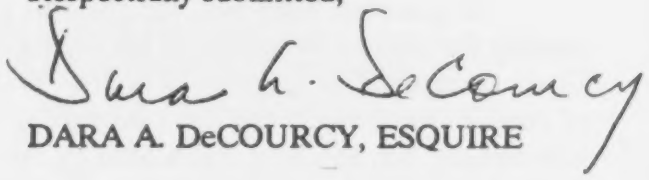
Despite the fact that the statutory remedy serves as a means for the "vindication of constitutional rights", the action remains a private party's civil suit for money damages. Furthermore, a Section 1983 suit affords but one of many vehicles under federal and state law for the discovery, remedy and deterrence of official misconduct.

The Court of Appeals' declaration on this issue of first impression merits this Honorable Court's review. Furthermore, the circumstances of this case would support enforcement of the agreement for the voluntariness of the agreement alone. Rumery, 480 U.S. at 398 n.10.

CONCLUSION

Petitioners respectfully request that this Court grant the petition.

Respectfully submitted,



DARA A. DeCOURCY, ESQUIRE

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Filed July 31, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-3252

FRANCES E. LIVINGSTONE and JOSEPH A. LIVINGSTONE, her husband,

Appellants

v.

NORTH BELLE VERNON BOROUGH; FAYETTE CITY BOROUGH; WASHINGTON TOWNSHIP; FRANK E. MONACK, JR., individually and in his capacity as officer of WASHINGTON TOWNSHIP; OFFICER RAYMOND MOODY, individually and in his capacity as officer for FAYETTE CITY BOROUGH; OFFICER DARHL SNYDER, individually and in his capacity as an officer for NORTH BELLE VERNON BOROUGH

On Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. No. 91-00059

Argued January 25, 1996

Before: COWEN and SAROKIN, *Circuit Judges* and POLLAK, *District Judge*[*]

(Filed July 31, 1996)

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*.Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

POLLAK, *District Judge.*

This is the second time that this matter has come before this court.

Appellants Frances and Joseph Livingstone commenced this civil rights suit, pursuant to 42 U.S.C. § 1983, in January, 1991 against defendants North Belle Vernon Borough, Fayette City Borough, Washington Township, Officer Darhl Snyder, Officer Raymond Moody, and Officer Frank E. Monack. The defendants moved for summary judgment, asserting that the Livingstones' claims were barred by an agreement said to have been made in 1990 in which the Livingstones waived any civil claims in exchange for the termination of a criminal prosecution of Frances Livingstone. (Agreements like this one, in which a criminal defendant waives potential civil claims in exchange for the dismissal of the case against her, are called "release-dismissal agreements.")

The district court granted summary judgment in favor of the defendants. In *Livingstone v. North Belle Vernon Borough*, 12 F.3d 1205 (3d Cir. 1993) (in banc) ("*Livingstone I*"), this court reversed, finding that there was a genuine issue of material fact as to whether the Livingstones had concluded the release-dismissal agreement voluntarily. 12 F.3d at 1214. In that opinion, we also observed that the agreement raised a number of other possible legal questions, including whether its enforcement would be in the public interest and whether it was invalidated by the municipalities' failure to formally ratify it.

On remand, the district court granted partial summary judgment in favor of the defendants as to the latter two questions, finding that the agreement's enforcement would be in the public interest and that no formal ratification was necessary. The district court then conducted a jury trial devoted to the single question whether the Livingstones had concluded the release-dismissal agreement voluntarily. The jury found that the Livingstones did indeed voluntarily conclude the release-dismissal agreement. Accordingly, the district court ordered that judgment be entered in favor of the defendants and against the Livingstones as to all of the Livingstones' claims. This appeal followed.

I. Factual Background and Procedural History

A. *Livingstone I.*

In *Livingstone I*, we compendiously summarized this case's elaborate factual and procedural history. It seems

efficient to reproduce that summary here *verbatim*. (Except as noted, all footnotes and all emendations are from *Livingstone I*.)

> This civil suit filed by Frances and Joseph Livingstone against the police officers and municipalities arose from the conduct of the police officers on the night of January 12-13, 1989, at the Livingstone home in Washington Township, Pennsylvania. During a family argument between Carrie Livingstone, age twenty-two, who was unmarried and living at her parents' home with her fourteen-month-old son, and Joseph, her father, Mr. Livingstone struck Carrie on the face, causing her lip to split and bleed. Carrie ran out of the house and to the community ambulance service across the street, where an employee called the police. When Officer Frank Monack arrived, Carrie told him that her father had struck her and that her parents were holding her son without her consent.
>
> Monack, who was at that time an officer in the Washington Township Police Department and is now Chief of Police, radioed for assistance pursuant to an intermunicipal police cooperation agreement. Raymond Moody, who was and is the Chief of Police for the Borough of Fayette City, and Darhl Snyder, an officer in the North Belle Vernon Police Department, responded. They proceeded to the Livingstone home where Mr. Livingstone permitted them to enter for the purpose, he later testified, of discussing possible criminal charges against him arising out of the incident. Following a brief discussion, Monack and Snyder accompanied Mr. Livingstone outside, and Monack told him to go to the nearby police station to make a statement.[1] No charges were filed against Mr. Livingstone that evening or at any later time.
>
> Monack and Snyder then reentered the Livingstone household, this time in search of Carrie's son and admittedly without a warrant or court order.[2] Mrs.

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1. The parties dispute whether Monack also told Mr. Livingstone he was under arrest.

2. There is some dispute as to Moody's whereabouts.

Livingstone had retreated to the back bedroom with her grandson, and had locked and barricaded the door. When she refused to open the door, Monack picked the lock and then tried to push the door open. From the partially opened door, Mrs. Livingstone hit him with a fishing rod and scratched him. Monack and Snyder broke the door down to enter the room, and then Monack told Mrs. Livingstone she was under arrest.

Mrs. Livingstone testified that both men struck her, causing her to lose consciousness and sustain bruises, lacerations, lost teeth, and head injuries. According to defendants, they used force only for the purpose of getting handcuffs on her after she struck the officer, and a stun gun to subdue her because she was screaming and kicking. Snyder held her down while Monack used the gun. Mrs. Livingstone claims that Monack then said "you want a thrill, I'll give you a thrill" and applied the stun gun between her legs. A medical examination conducted at the hospital that night notes a burn in the vulval area.

The officers removed Mrs. Livingstone, handcuffed, from the house. She states that they dragged her outside and dropped her several times, banging her head, and then left her lying in cold muddy water for hours. The officers claim that her thrashing caused them all to fall, and that she refused to get up.

On January 13, 1989, the morning after the altercation, Mrs. Livingstone was charged by Monack, on behalf of the Washington Township Police Department, with disorderly conduct, aggravated assault, terroristic threats, resisting arrest, and interference with custody. At a preliminary hearing on April 18, 1989, Mrs. Livingstone was held over for a jury trial on all but the terroristic threats charge, and the aggravated assault charge was reduced to simple assault.

The trial in Fayette County Court of Common Pleas began on February 13, 1990, with attorney Thomas R. Ceraso representing Frances Livingstone and Jack R. Heneks, Jr., an Assistant District Attorney,

representing the Commonwealth of Pennsylvania. Carrie Livingstone testified for the prosecution, followed by Monack, Snyder, Moody, Police Chief Robert Matthews of Washington Township, and Evelyn Rehe of the community ambulance service. The Commonwealth rested, and Mrs. Livingstone demurred to all of the charges. The demurrer was granted on the charge of interference with custody on the ground that there were no facts showing danger to the child, but was denied as to the other charges.

Thereafter, Joseph Livingstone and his son, James, testified for the defense. Before Mrs. Livingstone was to take the stand (and presumably would have testified about her claims with regard to police use of a stun gun on her private parts), the trial judge, Judge Cicchetti of the Court of Common Pleas, met with Heneks and Ceraso to discuss whether the matter could be resolved.[3] After settlement negotiations, a conference was held in camera with Judge Cicchetti. Present were Moody, Monack, Matthews (now deceased), the Livingstones, Ceraso, and Heneks.

Ceraso summarized the arrangement by stating that the defense would move for a judgment of acquittal after James Livingstone finished his testimony; that expenses for the physical damage to the Livingstone house and for Mrs. Livingstone's reasonable medical care would be paid; and that once those bills were paid, the Livingstones would release any civil claims. Ceraso stated on the record:

> there will be an agreement on the part of my client, Mrs. Livingston[e], and also her husband, Joe Livingston[e], who is present, that upon payment of reasonable medical bills that w[e]re associated with the incident that occurred, based on my forwarding

3. Plaintiffs assert that the Commonwealth initiated settlement negotiations, but Heneks in his affidavit states that it was the trial judge who instigated the settlement discussions. We do not find this a material dispute. The effect of the agreement "is not dependent upon which party first suggests the release. . . ." *Boyd v. Adams*, 513 F.2d 83, 88 (7th Cir.1975).

> those to Washington Township with confirmation, together with bills reflecting damage incurred at the household of Mr. and Mrs. Livingston[e], that Washington Township will cause the same to be paid. At the time of final payment of those bills, there will be a full and complete release signed with reference to any civil action on the part of Mr. and Mrs. Livingston[e]. It's also my understanding that at that time there will also be a release signed by Washington Township, or any of its proper officials, or any member of the police force necessary to release Mr. and Mrs. Livingston[e] from any liability
>
> . . . .

App. at 1109.

In response to the judge's inquiry, the parties voiced an expression of assent. The court asked whether "you all think this is in the best interest for everyone" and Matthews, Monack, and Heneks said they did. App. at 1112. When they returned to the courtroom, Ceraso moved for a judgment of acquittal on the criminal charges against Mrs. Livingstone, which the court granted.

It is undisputed that the settlement agreement was never reduced to writing. The Livingstones never submitted for payment any medical bills or household repair bills, and no payments have been made. The Board of Supervisors of Washington Township took no action to officially ratify the agreement until almost two years after the conference in chambers, and only then after this suit was started.[4] There is no evidence that the other two municipal defendants, North Belle Vernon Borough and Fayette City Borough, have ever taken any action to ratify any putative settlement.

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4. There was testimony that on the day of the settlement, two of the three members of Washington Township's Board of Supervisors were in the courthouse, were informed of the agreement, assented to it, and later telephoned the third supervisor, who also agreed. Washington Township has attached to its brief a document showing an official ratification by its Board of Supervisors in February 1992, after this suit was filed.

On January 14, 1991, almost a year after the criminal trial, the Livingstones filed this action against the police officers and the three employer municipalities. The complaint consisted of seven claims: a federal claim filed pursuant to 42 U.S.C. § 1983 (1988), and state law claims alleging assault and battery, malicious prosecution, malicious abuse of process, invasion of privacy, intentional infliction of emotional distress, and conversion.

The defendants filed motions to dismiss or, in the alternative, for summary judgment. The district court referred the case to a magistrate judge, who ordered the parties to engage in discovery [footnote omitted] and to submit briefs and materials in support of the motions.

In their briefs in support of summary judgment, defendants argued that the suit was barred by the release-dismissal agreement reached during the *in camera* conference before Judge Cicchetti. The Livingstones claimed that they never intended to waive their rights to sue, pointing out that the agreement was never reduced to writing and that Washington Township never made the contemplated payments. They also contended that the agreement was never properly entered into by the municipalities, as the Washington Township Board of Supervisors never formally approved it and the other boroughs' governing bodies never considered it, and that the agreement was invalid and unenforceable under Pennsylvania law.

On April 8, 1992, the magistrate judge submitted a Report and Recommendation recommending that summary judgment be granted for the defendants on the basis of the release-dismissal agreement. Although the court acknowledged that Washington Township may not have formally approved the agreement, it noted that two supervisors, a quorum, had approved it, thereby satisfying Pennsylvania law. Without comment on the absence of the other municipalities and officers from the agreement, the magistrate judge concluded that plaintiffs had contracted with all of the defendants, and thus the plaintiffs' civil suit was barred; that the agreement comported with due process because the

> plaintiffs understood that they were waiving their rights to assert future civil claims and had entered into the release voluntarily; and that there was sufficient consideration because the plaintiffs, in exchange for the surrender of their potential civil claims, had secured the dismissal of the criminal charges and a promise by the defendants not to sue them.
>
> Objections were filed but the district court adopted the magistrate judge's opinion as its own and granted summary judgment for all defendants. This timely appeal followed.

Livingstone I, 12 F.3d at 1206-09.

With this background history as predicate, the court in *Livingstone I* then proceeded to review the elements of proof for a showing of voluntariness, finding that the parties seeking to enforce the release-dismissal agreement bore the burden of showing that the Livingstones' assent was "voluntary, deliberate and informed." 12 F.3d at 1211. We concluded that the defendants had not met this burden with the certainty called for on summary judgment, given that Mrs. Livingstone was confused as to the terms of the release-dismissal arrangement, that the claimed release-dismissal agreement was never written down, and that the asserted agreement -assuming there was a meeting of the minds-was made, if at all, during a brief and ambiguous oral colloquy. *See id.* at 1211-14. Accordingly, we reversed the grant of summary judgment and directed that the case be remanded for further proceedings.

B. *Post-Livingstone I Proceedings*

Following remand, the defendants filed a motion for summary judgment challenging the Livingstones' complaint on a variety of grounds other than the release-dismissal agreement. Their motions were referred to a magistrate judge, whose Report and Recommendation ("R&R") the district court then adopted without substantive comment. In accordance with the recommendations of the magistrate judge, the district court ordered that (1) summary judgment be entered in favor of all defendants as to the Livingstones' claims of malicious prosecution, abuse of process, and

invasion of privacy;[5] and (2) summary judgment be entered in favor of Officer Moody as to the assault and battery claims. The district court denied summary judgment as to the Livingstones' constitutional claims, their claims of assault and battery against Officers Monack and Snyder, their claim of intentional infliction of emotional distress, and their conversion claim. App. at 326, 352.

The Livingstones then filed a motion for partial summary judgment renewing two arguments that they had already unsuccessfully made to the district court in the first round of the litigation. These arguments were that the release-dismissal agreement was unenforceable because (a) the municipalities had not ratified it, as (assertedly) required by Pennsylvania law, and (b) the release-dismissal agreement had been concluded in a manner which violated "the Pennsylvania Rules of Criminal Procedure and public policy." App. at 355.[6] The defendants responded with cross-motions for partial summary judgment that asserted that no ratification was necessary, because the Livingstones had failed to submit their medical bills to Washington Township for payment. The district court granted summary judgment in favor of the defendants on both the ratification question and the public-interest question.

The district court then conducted a jury trial limited to one question, whether the Livingstones voluntarily entered into the release-dismissal agreement. After several days of trial, including extended testimony by Thomas R. Ceraso (Mrs. Livingstone's lawyer at her criminal trial), the jury found that the Livingstones did indeed enter into the agreement voluntarily. Accordingly, the district court entered judgment in favor of the defendants and against the

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5. The R&R found that summary judgment should be granted as to the malicious prosecution claim because, as the underlying prosecution had ended with a compromise, it had not terminated favorably to Mrs. Livingstone. The R&R does not indicate whether this finding assumes the existence and validity of the release-dismissal agreement that is now before us, or — if it does not so assume — what the basis is for the finding that a compromise occurred.

6. It is customary to refer to "the public interest," rather than to "public policy," in discussing the enforceability of release-dismissal agreements, and this opinion will use the former terminology.

Livingstones. The Livingstones moved for a new trial, for judgment notwithstanding the verdict, and to amend the court's judgment to require Washington Township to pay household damages and medical bills to the Livingstones (apparently in order to enforce the terms of the release-dismissal agreement). These motions were denied, and this appeal followed.

On appeal, the Livingstones assert that the district court (1) erred in finding that the agreement was valid and enforceable even though the municipalities had not ratified it; (2) erred in ruling that the enforcement of the agreement was in the public interest as a matter of law; and (3) made a number of errors at the voluntariness proceeding.[7] We will discuss these questions in that order.

As to the second and third of these arguments, the district court, appellants, and appellees all assume that identical legal standards govern the enforcement of the release-dismissal agreement as to the Livingstones' section 1983 claims and as to their state-law claims. However, as we suggested in *Livingstone I*, *see* 12 F.3d at 1209 n.6, this is not necessarily the case. Federal common law governs the enforceability of the release-dismissal agreement as to the Livingstones' section 1983 claims, while we must look to Pennsylvania law to assess the enforceability of the agreement as to their state-law claims. Thus, the legal standards applicable to the Livingstones' state-law claims will be discussed separately.

II. Jurisdiction and Standard of Review

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. As to the municipal ratification and public-interest

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7. The Livingstones also renew their argument that the district court erred in declining to require Washington Township to pay Mrs. Livingstone's household damages and medical bills. There is not now a controversy as to whether Washington Township will or must pay the Livingstones' bills, as the Livingstones have not yet submitted those bills for payment. (We note that Washington Township has stated in its brief on appeal that it is willing to pay them if they are submitted.) We therefore agree with the district court that it is not at this time appropriate to order that Washington Township pay the Livingstones' medical bills.

questions, on which the district court granted summary judgment, our review is plenary. *See Erie Telecommunications Inc. v. City of Erie*, 853 F.2d 1084, 1093 (3d Cir. 1988). The appellants also assert that, at the voluntariness proceeding, the district court (1) gave an incorrect jury instruction, (2) erred in declining to give a requested jury instruction, and (3) made a number of incorrect evidentiary rulings. To the extent that appellants claim that a jury instruction failed to state the proper legal standard, our review is plenary. *See Government of Virgin Islands v. Isaac*, 50 F.3d 1175, 1180 (3d Cir. 1995). To the extent that appellants contest the district court's refusal to give particular jury instructions, our review is for abuse of discretion. *See id.* The evidentiary rulings that the appellants challenge are all discretionary rulings of the type that we review for abuse of discretion. This includes rulings as to the relevance of evidence and as to its prejudicial effect, *see In re Japanese Electronic Products*, 723 F.2d 238, 257, 260 (3d Cir. 1983), *rev'd on other grounds, sub nom. Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and as to waiver of the attorney-client privilege, *see United States v. Bilzerian*, 926 F.2d 1285, 1293 (2d Cir. 1991).

III. Municipal Ratification

The terms of the alleged release-dismissal agreement, as recited by Ceraso, were that:

> there will be an agreement on the part of my client, Mrs. Livingston[e], and also her husband, Joe Livingston[e], who is present, that upon payment of reasonable medical bills that w[e]re associated with the incident that occurred, based on my forwarding those to Washington Township with confirmation, together with bills reflecting damage incurred at the household of Mr. and Mrs. Livingston[e], that Washington Township will cause the same to be paid. At the time of final payment of those bills, there will be a full and complete release signed with reference to any civil action on the part of Mr. and Mrs. Livingston[e]. It's also my understanding that at that time there will also be a release signed by Washington Township, or any of its proper officials, or any member of the police force

> necessary to release Mr. and Mrs. Livingston[e] from any liability . . . .

Appellees North Belle Vernon Borough and Officer Darhl Snyder's App. at 30. In short, the arrangement was apparently that, after the prosecution of Mrs. Livingstone was terminated, the Livingstones would submit bills for property damage and for medical costs to Washington Township. Once the Township paid these bills, the Livingstones, the municipalities, and the police officers would then sign full mutual releases of civil claims.

The Livingstones concede that they never submitted their bills to Washington Township, as apparently required by the terms of the agreement. The district court found that their failure to do so rendered it impossible for the municipal defendants to ratify the release-dismissal agreement, as "the public fisc cannot be allocated for an indefinite amount to a private party." App. at 377-78. The district court did not, however, discuss an antecedent question: whether (and how) a contract was ever formed between the Livingstones and the municipalities. Conceptually, it would hardly be possible for the Livingstones to have rendered impossible the performance of a contract that was never formed.[8]

Under Pennsylvania law, a township cannot enter into a binding contract except by a vote of the township's supervisors. *See Abington Heights School District v. Township of South Abington*, 456 A.2d 722, 724 (Pa. Cmwlth. 1983). North Belle Vernon Borough and Fayette City Borough never conducted such a vote, and Washington Township only did so after the present suit was filed.[9] On

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8. Nor is it entirely clear how the performance of a contract between the Livingstones and either North Belle Vernon Borough or Fayette City Borough could have been rendered impossible by the Livingstones' failure to submit their bills to Washington Township, the only entity that seems to have been prepared to assume the obligation of paying those bills.

9. As we noted in *Livingstone I*, Washington Township's board of supervisors also apparently gave some type of informal assent to the agreement at the time that it was concluded. *See* 12 F.3d at 1208 n.4. There is some question as to whether this assent would satisfy the requirements of Pennsylvania law, however.

appeal, the Livingstones assert that the failure of the municipalities to ratify the release-dismissal agreement meant that no contract was ever formed between the Livingstones and the municipalities, and that the release-dismissal agreement is therefore unenforceable.

We will not address this question, however, because we find that it was not necessary for the municipalities to be parties to the release-dismissal agreement in order for it to be enforceable. It would suffice for the municipalities to have been third-party beneficiaries of an agreement concluded between the Livingstones and the Commonwealth of Pennsylvania; and, indeed, the colloquy before Judge Cicchetti suggests that this is what was intended (assuming, of course, that a valid agreement was formed at all). The principal parties negotiating the purported release-dismissal agreement were the Livingstones (through Mrs. Livingstone's attorney, Ceraso) and the Commonwealth (through Heneks, an assistant district attorney). The agreement's terms appear to have been that the Commonwealth would not oppose Mrs. Livingstone's motion for a judgment of acquittal. In exchange, the Livingstones would submit their medical and household damages bills to Washington Township, and, when those bills were paid, would sign a full release of civil liability with all of the municipalities and police officers involved, reciprocal releases of civil liability being signed by those police officers and municipalities with potential claims against the Livingstones.

Although the municipalities and police officers were clearly intended to benefit from this agreement, the agreement's success did not require them to be parties to it. The Livingstones were not harmed by the municipalities' lack of party status. If Washington Township did not pay the Livingstones' actual expenses, or if one of the municipalities or officers refused to sign (or to negotiate in good faith towards) a release, the Livingstones would have lost nothing. The criminal charges against Mrs. Livingstone could not have been reinstituted; moreover, the Livingstones would presumably have been free to file a civil

action against any of the municipalities or police officers that failed to cooperate as anticipated.[10]

An implicit term of this release-dismissal agreement is necessarily that the Livingstones could bring a civil suit against the municipalities or police officers only after the Livingstones had made a good-faith effort to negotiate towards reciprocal releases and those negotiations had failed. This term follows from the duty of good faith and fair dealing, *Restatement (Second) of Contracts* § 205 (1981), and that duty's correlative obligation not to act so as to defeat an agreement's objective. The record indicates that the Livingstones did not make any effort to negotiate towards such reciprocal releases. Hence, assuming that the release-dismissal agreement is otherwise valid and enforceable — the question that we will address next — the Livingstones' failure to seek mutual releases would seem to bar their suit.[11]

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10. There is some indication that the Livingstones may have reasonably believed that Washington Township was a party to the release-dismissal agreement. Immediately after Ceraso's remarks, quoted above, in the in-camera colloquy, Mr. Heneks said: "Your Honor, that is my understanding of the agreement that has been reached between the Washington Township Police Department and the Washington Township authorities that are present." Appellees' App. at 32. This statement might well have led the Livingstones to believe that Washington Township was a party to the agreement.

We will not decide here when, and whether, Washington Township became a party to the agreement. But, even if a mistake did occur as to the Township's status as a party, it would not be enough to render the agreement voidable. In the words of the Restatement (Second) of Contracts, "Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party . . . ." *Restatement (Second) of Contracts* § 152(1) (1981). The agreed exchange of performances would not have been affected by the non-participation of Washington Township. As noted in the text, had Washington Township declined to pay the Livingstones' bills, or declined to sign a waiver, the Livingstones would have remained free to bring a civil suit, and hence would not have been harmed.

11. The duty of good faith and fair dealing exists not only under federal common law, but also under Pennsylvania law. *See, e.g. Somers v.*

The Livingstones also question whether North Belle Vernon Borough and Fayette City Borough-which I will refer to, for brevity, as "the two boroughs"-had the same status under the release-dismissal agreement as did Washington Township. In the voluntariness proceeding in the district court, counsel for the Livingstones had requested that a specific question on the verdict form address the status of the two boroughs under the agreement. The district court declined to include such a question on the form, finding that Ceraso's statements in the colloquy before Judge Ciochetti included all three municipalities, and that all three therefore had the same status for purposes of the voluntariness question. In response to the objections of the Livingstones' counsel to this ruling, the district court permitted him to argue to the jury that the ambiguous nature of the agreement between the Livingstones and the two boroughs rendered the release-dismissal agreement involuntary as a whole. App. at 804-06.

Although the Livingstones' argument focuses on whether the release-dismissal agreement was voluntary as to the two boroughs, this issue cannot be completely disentangled

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Somers, 613 A.2d 1211, 1214 (Pa. Super. 1992) ("In the absence of an express provision, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract") (quoting *Frickert v. Deiter Brothers Fuel Co.*, 347 A.2d 701, 705 (Pa. 1975) (Pomeroy, J., concurring)). Thus, the foregoing analysis applies both to the Livingstones' claims under federal law and to their state-law claims.

If the parties to an agreement intend for a third party to be a beneficiary, the third party is entitled to enforce its rights under that agreement. *See Restatement (Second) of Contracts* § 304 (1981); *see also Fizz v. Kurtz, Doud & Nuss, Inc.*, 519 A.2d 1037, 1039 (Pa. Super. 1987) (holding that a beneficiary may enforce its right to performance if "recognition of a beneficiary's right to performance is appropriate to effectuate the intention of the parties") (internal quotation omitted). Because the municipalities and police officers appear to have been intended beneficiaries of the alleged agreement, they have standing to insist that the Livingstones have a legal duty to perform their obligations under that agreement.

from that of whether the agreement addressed the boroughs at all. The colloquy before Judge Cicchetti is far from a model of clarity on this question.[12] During the colloquy, Ceraso stated that he had

> no objection if those police departments or those municipalities also wish to be included in the release, and we would then have reciprocal releases from them, and we would let that up to their individual counsel to make that decision, but we certainly would have no objection in doing that so it would be reciprocal on both sides.

Appellees North Belle Vernon Borough and Officer Darhl Snyder's App. at 31. This statement can be construed either (1) as indicating that the Livingstones had undertaken to negotiate towards a civil release with the two boroughs (making the boroughs, with Washington Township, third-party beneficiaries of the release-dismissal agreement), or (2) as merely making an offer to those two municipalities.

The question of which of these readings of Ceraso's remarks is correct was not argued before the district court. On remand, the district court should permit the parties to brief this question. In resolving this issue, the district court may consult all of the sources to which courts usually refer in determining the meaning of ambiguous contractual language, including, for instance, the course of the negotiations between the parties.[13]

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12. This is an illustration of why release-dismissal agreements should be concluded in writing. *See infra*, pp. 31-36.

13. We note that Ceraso seems to have had at least apparent authority to negotiate a release-dismissal agreement on Mrs. Livingstone's behalf. As a matter of contract interpretation, then, she would be bound by the terms of the agreement as he negotiated them, even if his understanding of the agreement's terms differed from hers. (In his testimony before the district court, Ceraso also repeatedly referred to himself as representing Mr. Livingstone. *See, e.g.*, App. at 713, 714, 715, 716, 719. The record does not make clear, however, whether (and, if so, when) an attorney-client relationship actually arose between Ceraso and Mr. Livingstone.)

A release-dismissal agreement is not, of course, an ordinary contract. Thus, if Mrs. Livingstone's understanding of the two boroughs' status

IV. The Public Interest

In *Town of Newton v. Rumery*, 480 U.S. 386 (1987), a four-Justice plurality found that, as a matter of federal common law, a release-dismissal agreement will operate to bar a section 1983 claim unless "the interest in [the agreement's] enforcement is outweighed in the circumstances by a public policy harmed by the enforcement of the agreement." *Id.* at 392. Justice O'Connor, whose fifth vote was dispositive, noted in a concurring opinion that it is the burden of the defendants to demonstrate that "a particular release executed in exchange for the dismissal of criminal charges was voluntarily made, not the product of prosecutorial overreaching, and in the public interest." *Rumery*, 480 U.S. at 401.

In *Cain v. Darby Borough*, 7 F.3d 377 (3d Cir. 1993) (in banc), *cert. denied*, 114 S. Ct. 1303 (1994), this court addressed the circumstances in which enforcement of a release-dismissal agreement will be in the public interest. *Cain* made clear that the above-quoted passage from Justice O'Connor's *Rumery* concurrence should not be read to suggest that the "prosecutorial overreaching" and "public interest" questions are to be analyzed separately; rather, "the concept of prosecutorial misconduct is embedded in a larger inquiry into whether enforcing the release would advance the public interest." *Id.* at 380; *see also Lynch v. City of Alhambra*, 880 F.2d 1122, 1126 n.6 (9th Cir. 1989) (arguing that there is only one inquiry); *but compare Woods v. Rhodes*, 994 F.2d 494, 500-01 (8th Cir. 1993) (apparently treating the analyses as distinct).

Cain found that a party seeking to demonstrate that the enforcement of a release-dismissal agreement is in the public interest must make two distinct showings, which we will call here *Cain*'s "objective" and "subjective" elements.

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under the agreement differed from Ceraso's, this fact could be taken into account in the voluntariness analysis. In this regard, we observe that, should it become necessary on remand to conduct a new voluntariness proceeding, the district court should permit the Livingstones to argue that the release-dismissal agreement was voluntary as to certain of the municipalities but not as to others.

Cain's objective element requires both that "the facts known to the prosecutor when the agreement was reached" must have sufficed to support the prosecutor's proffered public interest reason for concluding the agreement, and that this public-interest reason be a legitimate one. 7 F.3d at 381. Relevant public interests include the interest, cited by the Court in *Rumery*, in avoiding the costs and disruptions associated with defending "marginal" or "frivolous" civil rights actions, *Rumery*, 480 U.S. at 395, and the countervailing interest, also cited by the Court, in detecting and deterring official misconduct. *See Rumery*, 480 U.S. at 394; *id.* at 400 (O'Connor, J., concurring).

Cain's subjective element is its requirement that:

> the public interest reason proffered by the prosecutor must be the prosecutor's *actual reason* for seeking the release. . . . Any alternative to the 'actual reason' requirement creates the real danger that actions taken pursuant to an improper motive, such as to protect public officials from a meritorious civil rights lawsuit, may be legally excused because a court later finds that some 'benefit' might have been incidentally achieved.

7 F.3d at 381 (emphasis in original). The party seeking to enforce the release-dismissal agreement bears the burden of proof on both of these elements.

In the present case, the district court denied a motion by the Livingstones that sought to establish as a matter of law that the enforcement of the release-dismissal agreement was contrary to the public interest, and instead entered summary judgment against the Livingstones on this question, finding that the enforcement of the agreement was in the public interest as a matter of law. On appeal, the Livingstones challenge both rulings. They argue, first, that the district court erred in denying their motion for summary judgment, and that it should have found the release-dismissal agreement unenforceable as a matter of law. In the alternative, they contend that the district court erred in granting the appellees' motion for summary judgment, because there was a genuine issue of material fact as to prosecutorial motive.

The Livingstones' two arguments are founded on distinct elements of the *Cain* analysis. Their argument that the district court erred in declining to find the release-dismissal agreement unenforceable as a matter of law is directed at *Cain*'s objective element; it challenges the district court's conclusion that the facts known to the prosecutor at the time the release-dismissal agreement was concluded sufficed to establish that it was in the public interest to conclude such an agreement. Their argument that there is a genuine issue of material fact as to prosecutorial motivation is directed at *Cain*'s subjective component, which requires that the prosecutor's stated reason for concluding a release-dismissal agreement "must be the prosecutor's *actual reason* for seeking the release." *Cain*, 7 F.3d at 381. We will consider these arguments in that order.

A. Cain's *Objective Element*

1. *The District Court's Analysis*

The district court concluded that the facts known to the prosecutor at the time the agreement was concluded justified finding that the enforcement of the release-dismissal agreement would be in the public interest. The court explained its conclusion as follows:

> Here, Judge Cicchetti, who presided over the criminal trial against Mrs. Livingstone and who supervised the execution of the release-dismissal agreement, stated in the colloquy that he was supportive of the agreement because he saw no benefit to a criminal trial and that it was in everyone's best interest to resolve the matter. Mr. Heneks, the assistant district attorney who was assigned to the case stated that he believed that the Commonwealth would be well-served by the resolution as well. Later, in a sworn statement, Mr. Heneks indicated that continuation of the criminal trial would have created further conflict between the Livingstones and their daughter who had reconciled their differences since the night of the incident. In addition, he stated that the agreement saved the Commonwealth from spending further resources to prosecute. The reasons stated by Mr. Heneks are factors that were known to

> him at the time the agreement was executed. In the absence of evidence that the motivation was improper, we may accept his explanation. In addition, each reason constitutes an independent, legitimate reason which is directly related to his prosecutorial responsibilities. *See Rumery*, 480 U.S. at 398.

App. at 380-381. The court's analysis posits three public-interest rationales for upholding the release-dismissal agreement: the agreement's supervision by Judge Cicchetti, the desire of the Commonwealth to avoid further conflict between the Livingstones and their daughter, and the Commonwealth's wish to avoid expending more of the Commonwealth's resources to prosecute Mrs. Livingstone. We will consider these three rationales seriatim.

As to the first of the three rationales, it is of course true that (1) the *Rumery* plurality noted that judicial supervision of release-dismissal agreements can "help ensure that the agreements did not result from prosecutorial misconduct," 480 U.S. at 399 n.10, and (2) Justice O'Connor observed that such supervision can "bear on whether a release was voluntary and not the product of overreaching," *id.* at 401-02. Judicial supervision can indeed be important in ensuring that an agreement was concluded voluntarily, and, to a lesser extent, that the prosecutor's stated reasons for seeking an agreement are genuine. Judicial supervision is less relevant to *Cain*'s objective inquiry, however, which focuses on the information known to the prosecutor. At best, judicial supervision may help to reinforce a subsequent court's independent determination that a prosecutor had a sound public-interest reason for concluding a release-dismissal agreement. As will become clear, it seems unlikely that Judge Cicchetti's supervision of the dismissal of the charges against Mrs. Livingstone played that role here.

Nor does Heneks' asserted desire to avoid further stress to the Livingstone family serve a particularly strong public interest. It is, of course, commendable for prosecutors to give some thought to the welfare of the accused's family. In practice, however, the public would be rightly surprised were a prosecutor to place these considerations above, for instance, the public interest in punishing crime, or the

public interest, expressed in section 1983, in exposing official abuse.[14] We do not think that the public's interest in avoiding strain to a defendant's family can, standing alone, be a legitimate reason for concluding a release-dismissal agreement.

Nor, finally, does Heneks' wish to avoid the cost of further prosecution carry much weight. A desire to avoid the cost of prosecution (and of a related civil suit) may be an acceptable public-interest rationale for some release-dismissal agreements. As Justice O'Connor observed in *Rumery*:

> [P]rosecutors may legitimately believe that, though the police properly defused a volatile situation by arresting a minor misdemeanant, the public interest in further litigation is outweighed by the cost of litigation. Sparing the local community the expense of litigation associated with some minor crimes for which there is little or no public interest in prosecution may be a legitimate objective of a release-dismissal agreement.

480 U.S. at 399-400. By definition, in any case in which a release-dismissal agreement has been concluded, the community will have avoided the cost of prosecution; thus, a prosecutor could assert that "the public interest in further litigation is outweighed by the cost of litigation" in any case. In order to ensure that such assertions do not act as a blanket exception to the public-interest element of *Rumery*, the courts must subject those assertions to close scrutiny.[15]

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14. Moreover, as we observed in *Livingstone I*, "whatever opportunity existed for further rupture in the Livingstone family had already been accomplished by the testimony of all family members save Mrs. Livingstone." 12 F.3d at 1215.

15. In the present case, the claim that the public interest in further prosecution was outweighed by the prosecution's cost seems far from persuasive. As we observed in *Livingstone I*, "the agreement was struck, if at all, towards the conclusion of Mrs. Livingstone's defense," so that "the cost of the prosecution had already been incurred." 12 F.3d at 1215. Any cost savings associated with terminating a prosecution that was nearing its end are likely to have been relatively small. On the other hand, the public interest in prosecuting Mrs. Livingstone may well have been substantial. Mrs. Livingstone was charged with assaulting a police officer, conduct which it is ordinarily thought to be in the public interest to punish.

2. Marginal or Frivolous Nature of the Livingstones' Civil Rights Claims

The record does not indicate that Heneks considered whether the Livingstones' civil rights claims were marginal or frivolous before concluding the agreement. In *Cain*, we stated that a prosecutor must conduct an "individualized analysis" of a defendant's civil rights claims before concluding a release-dismissal agreement, 12 F.3d at 383, and that in order for a release-dismissal agreement to be enforceable "there must be a case-specific showing that the released civil rights claims appeared to be marginal or frivolous at the time the agreement was made and that the prosecutor was in fact motivated by this reason." *Id.*[16]

The question whether the facts known to Heneks could have supported the conclusion that the Livingstones' civil rights claims were marginal or frivolous was not addressed in the district court.[17] On this record, resolution of that

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16. *Cain* implied that prosecutors might be excused from its requirement that they determine whether released civil rights claims appear marginal or frivolous in cases in which other public-interest reasons support enforcement of a release-dismissal agreement. *See id.* (referring to a showing that "the release-dismissal agreement advanced any other public interest"). This exception must necessarily be reserved for cases, like *Rumery*, in which unusually strong public interests support the release-dismissal agreement. *See infra* note 27. If prosecutors could routinely avoid assessing the merits of civil rights claims merely by citing such considerations as the avoided costs of trial — considerations that, as we have already noted, could be cited in virtually any case — *Cain* would have little force.

Indeed, in *Cain*, the prosecutor had required that a criminal defendant sign a civil release before entering Accelerated Rehabilitative Disposition (ARD). ARD is a program under which persons subject to relatively minor charges can undergo a probationary period in lieu of trial, and is intended precisely for cases in which the costs to the public of further prosecution outweigh the benefits of such prosecution. *See Cain*, 7 F.3d at 382-83. Thus, by consenting to ARD, the prosecutor in *Cain* had implicitly decided that it was not in the public interest to incur the costs of trial. Nevertheless, the *Cain* court found that the prosecutor was required to assess the merits of civil rights claims before concluding a release.

17. Under *Cain*, we will only enforce a release-dismissal agreement on the basis of public-interest reasons for enforcing a release-dismissal

question in the defendants' favor was a necessary predicate for a grant of summary judgment holding that the release-dismissal agreement was in the public interest. We will, therefore, vacate the district court's grant of summary judgment and remand the case so that the parties can address the question whether the Livingstones' civil rights claims were regarded — and, if so, whether they were properly regarded — by the prosecuting attorney as marginal or frivolous.

We think that, on remand, the parties will, at a minimum, wish to take account of the material in this record which suggests that, at the time Heneks agreed to the dismissal of the charges against Mrs. Livingstone, considerable information pointing in the direction of significant police misconduct had come to Heneks' attention.[18] Of course, what is of record here cannot be deemed dispositive of the question whether Heneks could properly have concluded that the Livingstones' civil rights

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agreement that were actually considered by the prosecutor who concluded that agreement. It is not now clear whether Heneks considered the marginal or frivolous nature of the Livingstones' claims. Heneks' affidavit discussing the circumstances under which the release-dismissal agreement was concluded does not state that he considered whether the Livingstones' possible civil rights claims were marginal or frivolous. App. at 627. However, the affidavit also does not foreclose the possibility that Heneks considered this question; the affidavit was signed in November 1991, some two years before *Cain* was decided, so that Heneks (and the appellants) can perhaps be excused for failing to address this issue in the affidavit. The Livingstones have seemingly never raised the applicability of this element of *Cain* in the district court. In these circumstances, we do not think that the appellees can fairly be treated as having waived the opportunity to address this matter in the district court. (Of course, if, on remand, it emerges that Heneks did not consider the marginal or frivolous nature of the Livingstones' civil rights claims, that will end the district court's inquiry, and the release-dismissal agreement will, under *Cain*, be unenforceable.)

18. As a general matter, civil rights claims based on substantial evidence of official misconduct will not be either marginal or frivolous. But this may not be true in every case. For instance, if the official involved would clearly have absolute immunity for the alleged misconduct, then a subsequent civil rights suit might indeed be marginal, whether or not there is substantial evidence that the misconduct occurred.

claims were marginal or frivolous, for the reason that the proceedings in the district court have not been focused on that issue. Further evidence may be adduced on remand that casts the relevant events in a very different light. But we think it may be helpful to relate the principally salient matter appearing in our current record in order to provide a point of departure for the proceedings on remand.

The most important item of evidence in this respect is the report of Dr. Noche, the emergency-room doctor who examined Mrs. Livingstone on the night of her encounter with the police. That report indicates that Mrs. Livingstone had first or second degree burns in her vaginal area.[19] The substance of Dr. Noche's report was almost certainly known to Assistant District Attorney Heneks.[20] The record does not

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19. The report states:

> Pelvic examination consisted of examination of the vulvar area and vaginal canal. The area is rather red and there is whitish burn like lesions. A magnifying lense [sic] was used and this appeared to be a first or . . . second degree burn of the right side of the introitus. The left side is erythematous but does not have the same lesion as the right side. The canal itself is not red.

App. at 549. Webster's Third New International Dictionary (1966) defines "erythematous" as meaning "relating to or marked by erythema." The latter word is in turn defined as "abnormal redness of the skin due to capillary congestion (as in inflammation)."

20. At a deposition, Officer Monack stated, when asked by counsel for the Livingstones whether Monack had known the nature of Mrs. Livingstone's claims of injury: "I would imagine. I think for some reason Mr. Ceraso asked Mr. Heneks if we could just go on the medical reports versus having to call the doctor in." App. at 495. Officer Monack's testimony appears to describe an evidentiary stipulation of the sort that frequently occurs at trial. This stipulation presumably related to the emergency-room report, which was, according to Ceraso, App. at 227, 769-72, the only medical record available to him. It seems improbable that Heneks would not have familiarized himself with the contents of the report before stipulating to its authenticity.

Heneks was also one of the principal negotiators of the release-dismissal agreement. In those negotiations, Washington Township had indicated that it would pay Mrs. Livingstone's medical bills. It would be curious indeed for Heneks to have conducted this negotiation without knowing the substance of the medical report itself. Heneks certainly had ample opportunity to learn what the report said; he was in regular communication with both Ceraso and Monack, both of whom knew the report's contents. App. at 227, 495.

contain any plausible explanation of how this burn came to appear on Mrs. Livingstone's genitalia — other than Mrs. Livingstone's own explanation, which was that it was the result of the police's deliberate misuse of a stun gun.[21] Nor is there any indication in the record that Heneks was aware of other evidence that contradicted the emergency-room report.[22] In short, it is difficult to escape the conclusion that Dr. Noche's report significantly corroborates Mrs. Livingstone's claim that the police deliberately applied a stun gun to her genitalia, an act that, if it did occur, would amount to an outrageous instance of police abuse.[23]

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21. Counsel for appellees asserted at oral argument that it is the position of the police-officer defendants that a stun gun had been used, but on Mrs. Livingstone's thigh. It is, perhaps, conceivable that one of the police officers inadvertently applied the stun gun to Mrs. Livingstone's genitalia, and that neither of the police officers involved in the encounter with Mrs. Livingstone noticed this error. Such a scenario, however, hardly seems likely; a trained police officer would presumably exercise great caution in the use of a stun gun, and would be likely to notice if he (or another officer) used such a gun improperly.

22. Heneks did state, in an affidavit, that "I believed we had a sufficient case for conviction." App. at 625. But this, of course, does not imply that no police misconduct occurred; for instance, Mrs. Livingstone and Officer Monack may both have been at fault — i.e., each may have assaulted the other.

It is also true that Mrs. Livingstone's own lawyer, Ceraso, testified that he had believed during the criminal trial that Mrs. Livingstone was unlikely to win a large damages award in a civil rights suit. App. at 227, 767. Upon close examination, however, Ceraso's doubts seem to be more in the nature of pragmatic concerns about the likely extent of Mrs. Livingstone's recovery than a belief that she did not have a viable cause of action. For instance, Ceraso noted that there were no follow-up medical records documenting her damages claims. App. at 227.

Finally, the Federal Bureau of Investigation did apparently inquire into whether criminal charges should be brought against Officer Monack based on the events of the night of January 12, 1989, and decided that they should not. App. at 457, 473. But, of course, criminal and civil standards of proof are different, and the section 1983 public interest in preventing police misconduct is by no means vindicated whenever an official body declines to bring criminal charges.

23. A further item of evidence, also available to Heneks, should have suggested to him that not only the police-officer defendants, but also

It is possible that facts not in the present record would undermine some element of the foregoing analysis.[24] On remand, the parties should address (1) whether Heneks made a determination that the Livingstones' civil rights claims were marginal or frivolous, and, if so, on what basis he did so; (2) whether Heneks knew or should have known[25] of the foregoing evidence of police misconduct; and (3) if Heneks did know, or should have known, of that evidence, whether other facts available to Heneks in some way undercut it. We emphasize that it would not suffice for the defendant municipalities and police officers to demonstrate on remand that Heneks was aware of other evidence that merely contradicted the foregoing evidence of police misconduct, as this would only establish that there was substantial evidence on both sides of the misconduct question.[26] Instead, defendants would have to demonstrate

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Washington Township, may have been responsible for violating Mrs. Livingstone's civil rights. This evidence was the testimony of Police Chief Matthews at Mrs. Livingstone's criminal trial, which suggested that the Township had a policy of returning children to their mothers, irrespective of "the welfare of the child or anything else." App. at 425. As Magistrate Judge Mitchell observed, in a (subsequently adopted) Report and Recommendation finding it inappropriate to enter summary judgment in favor of the municipalities as to the Livingstones' Fourth Amendment claims, this testimony could be read to suggest that it was Washington Township's policy to act without securing a warrant — as apparently occurred in this case. App at 332. (This is not, of course, the only interpretation of Matthews' testimony.)

24. For instance, it is at least conceivable that accurate information available to Heneks (but somehow omitted from the present record) indicated that the medical report of Mrs. Livingstone's burns was fabricated.

25. The pertinence of what a prosecutor should have known stems from *Cain*'s instruction that prosecutors examine the public interests at stake "on a case-by-case basis" before concluding release-dismissal agreements. 7 F.3d at 382. Charging prosecutors with constructive knowledge of any evidence of which they should have been aware helps to ensure that a would-be plaintiff is not harmed by a prosecutor's failure to carry out this duty.

26. This distinguishes the present case from situations in which the principal facts are not at all clear, and mutual misconduct is one

that Heneks was aware of other evidence that rendered the foregoing evidence of police misconduct fundamentally untrustworthy.

It is conceivable that the district court may conclude that Heneks was not aware, and had no reason to be aware, of some of the foregoing evidence of official misconduct, and that, not being apprised of this evidence, Heneks reasonably determined that the Livingstones' civil rights claims were marginal or frivolous. That would not, however, be the end of the district court's inquiry. The district court would then have to address the further question whether enforcement of a release-dismissal agreement in the face of substantial evidence of police misconduct would be compatible with *Rumery* and *Cain*, notwithstanding that the evidence of misconduct was not known, or reasonably knowable, by the prosecutor at the time the prosecutor entered into what might appear, in retrospect, to be an improvident agreement.[27]

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conceivable explanation. In such a case, as the Ninth Circuit observed in *Lynch v. City of Alhambra*, 880 F.2d 1122 (9th Cir. 1989), there is at least an argument for the use of release-dismissal agreements:

> One rationale for the use of these agreements is that they achieve a rough substantial justice where the "true" facts of the case are not known. For example, if the prosecutor is confronted with conflicting stories of police misconduct, and is genuinely unsure as to whom to believe, the execution of a release-dismissal agreement allows everyone to declare the case a draw and go home, thereby avoiding the risk and expense of going to trial.

Id. at 1127 n.8. In a case in which there is substantial evidence that official misconduct has occurred, it is less appropriate to declare a case a draw. This is particularly true when one of the parties purportedly agreeing to a draw is the subject of a pending criminal prosecution.

27. *Cf. Coughlen v. Coots*, 5 F.3d 970, 975 (6th Cir. 1993) (finding that enforcement of a release may not be in the public interest in a case in which there is substantial evidence of police misconduct). For purposes of this analysis, it may be useful to distinguish between those interests of the public that are served simply by the termination of a prosecution (such as avoiding the costs of that prosecution), and those that can only be served by enforcing a release-dismissal agreement. A possible example of the latter type of interest is provided by *Rumery* itself. In *Rumery* the

B. Cain's *Subjective Element: Prosecutorial Motivation*

Cain's subjective element requires that the public-interest reasons cited by a party seeking to enforce a release be those that actually motivated the prosecutor to conclude the release. That is, under *Cain*, a court may not enforce a release if it finds that the release was concluded for some reason different from that presented as justifying enforcement, even if the court believes that "some 'benefit' " would be "incidentally achieved" by enforcement. *Cain*, 7 F.3d at 381.

The Livingstones challenge the district court's determination that there was not a genuine issue of material fact as to whether the prosecutor's stated reasons for concluding the release-dismissal agreement were his actual reasons for doing so. The district court based this determination on the following: (1) the charges against Mrs. Livingstone were filed the day after her encounter with the police; (2) the charges "correspond to the relevant conduct of Mrs. Livingstone according to the statement taken from Carrie Livingstone, and the affidavit which supports the complaint"; and (3) "discussions of settlement were initiated after nearly three days of testimony in the criminal trial." App. at 379-80.

We do not quarrel with these three propositions. But they do not, in our judgment, constitute a sufficient predicate for the determination that there is no genuine issue of material fact with respect to whether the prosecutor's stated reasons were his real reasons. As we have noted, on

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prosecutor's reason for concluding a release-dismissal agreement was to abort two trials — Rumery's criminal trial and the civil suit expected to be brought by Rumery — which would have required the testimony of a potential witness whose testimony was needed by the prosecutor in *another* trial and for whom testifying was likely to be traumatic. Only enforcement of the release-dismissal agreement could have served this interest. *See* Seth F. Kreimer, *Releases, Redress and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. Pa. L. Rev. 851, 932-35 (1988) (arguing that the courts should pay close attention to this class of public interests in analyzing the enforceability of release-dismissal agreements).

the record before this court it appears not unlikely that the prosecutor was aware of substantial evidence of police misconduct in the present case. This lends credence to the inference that the prosecutor's decision to bring charges against Mrs. Livingstone, the manner in which he conducted the trial, and his decision to propose the conclusion of a release-dismissal agreement to the Livingstones may have been motivated by a desire to protect the relevant police officers and municipalities from liability. Such a motivation would render the agreement unenforceable. *See Cain*, 7 F.3d at 381.

None of the three propositions relied on by the district court eliminates the possibility that the prosecutor acted with an improper motive. As to the fact that the charges against Mrs. Livingstone were filed promptly, it is true that, had the charges against Mrs. Livingstone been brought well after the incident, or after the police learned that she intended to sue, this might have indicated prosecutorial misconduct. *See Lynch v. City of Alhambra*, 880 F.2d 1122, 1128-29 (9th Cir. 1989). But the fact that the charges against her were brought promptly does not, conversely, demonstrate that no misconduct occurred. As to the fact that the charges against Mrs. Livingstone were supported by independent evidence, charges need not be fabricated in order for a release-dismissal agreement to be the product of an improper prosecutorial motive. The relevant question is instead whether the decision to pursue a prosecution, or the subsequent decision to conclude a release-dismissal agreement, was motivated by a desire to protect public officials from liability. Finally, the fact that the discussions of settlement were initiated "after nearly three days of testimony in the criminal trial" is subject to many interpretations. One interpretation which is at odds with summary judgment is that a purpose of the trial was to erode the Livingstones' resistance to signing a release.

We therefore find that there is a genuine issue of material fact as to whether the prosecutor's stated reasons for concluding the release-dismissal agreement at issue in the present case were his actual reasons. Thus, should the district court find that information known to the prosecutor could have sufficed to establish that there was a legitimate

public-interest reason for concluding a release-dismissal agreement, it should then conduct a jury trial to determine whether the prosecutor's stated reasons for concluding an agreement were his actual reasons for doing so.[28]

V. Voluntariness

A. *Standard of Proof of Voluntariness*

The district court instructed the jury that the defendant's burden of proof in establishing the voluntariness of the release-dismissal agreement was one of "preponderance of the evidence." The Livingstones challenge that instruction, arguing that the standard should have been one of "clear and convincing evidence." We agree.

In *Rumery*, the Supreme Court had no occasion to consider the appropriate standard of proof; the language used by the Court in finding the release-dismissal agreement at issue in that case enforceable was consistent with either a preponderance standard or a standard of clear and convincing evidence.[29] Although we did not explicitly address the question of the appropriate standard of proof in

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28. In *Livingstone I*, we observed that, although the ultimate question of whether enforcement of a release-dismissal agreement is in the public interest is a question of law for the court, "there may be factual issues intertwined with the legal issues, such as whether the public interest reason proffered by the prosecutor is the actual reason that motivated the prosecutor to enter into the release-dismissal agreement." 12 F.3d at 1215. Prosecutorial motivation is, accordingly, a jury question.

The question whether there is substantial evidence of police misconduct, by contrast, is not. The process of weighing the evidence of police misconduct against the prosecutor's asserted reasons for concluding a release-dismissal agreement is part of the broad task of balancing the public interests that favor and that disfavor enforcement. That task is one for the court. *See Berry v. Peterson*, 887 F.2d 635, 637 (5th Cir. 1989).

29. Both Justice Powell's plurality opinion and Justice O'Connor's concurring opinion found that there was strong evidence that the agreement at issue in *Rumery* had been concluded voluntarily. Indeed, Justice Powell said that it was "clear" that Rumery entered into the agreement voluntarily, 480 U.S at 396, while Justice O'Connor described the evidence that Rumery entered into the agreement voluntarily as "convincing." *Id.* at 403.

Livingstone I, we did observe that oral release-dismissal agreements should be subjected to particularly exacting judicial scrutiny:

> Ordinarily, the existence and terms of [a release-dismissal] agreement can be resolved by reference to a written document. While we do not hold that as a matter of law an oral agreement to waive the right to sue in exchange for the dismissal of criminal charges can never be valid, the absence of a written release-dismissal agreement requires even more scrupulous review by the courts than otherwise. No published opinion of any of the courts of appeals after *Rumery* has even considered, much less sustained, an oral release-dismissal agreement. Indeed, the *Rumery* Court never mentioned the possibility of an oral release-dismissal agreement. Justice Stevens, at least, assumed that such agreements were written. *See Rumery*, 480 U.S. at 417 n.22, 107 S.Ct. at 1205 n.22 ("A court may enforce such an agreement only after a careful inquiry into the circumstances under which the plaintiff *signed the agreement* and into the legitimacy of the prosecutor's objective in entering into [it]." (emphasis added)) (Stevens, J., dissenting).

12 F.3d at 1212. We then noted a number of advantages of written agreements. These included the fact that they "allow the parties more opportunity for deliberate reflection," *id.*, and that a written document facilitates negotiation as to the agreement's terms, *see id.* at 1213. We also observed that a written release-dismissal agreement may provide a subsequent court with evidence as to "the parties' respective bargaining power." *Id.* For example, if the attorney for the party forgoing civil claims prepared the agreement, this may support the conclusion that the agreement was voluntary; if the prosecutor did so, and if he presented it in a manner that discouraged negotiation, this may support the conclusion that it was not. *See id.*

In *Addington v. Texas*, 441 U.S. 418 (1979), the Supreme Court set forth its methodology in assigning standards of proof:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm

> of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1070, 25 L.Ed.2d. 368 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.*Id.* at 423. The Court then placed the three standards of proof within this broad framework. The least demanding standard, that of a preponderance of the evidence, is appropriate to a "typical civil case involving a monetary dispute between private parties." *Id.* Society's concern with the outcome of such a case is "minimal"; thus, it is appropriate to adopt a standard that allocates the risk of error between the litigants "in roughly equal fashion." *Id.* The standard of proof beyond a reasonable doubt, by contrast, is reserved for criminal cases, in which society wishes to "exclude as nearly as possible the likelihood of an erroneous judgment." *Id.*

Intermediate between these two standards is the one applicable in cases in which "the interests at stake . . . are deemed to be more substantial than mere loss of money." *Id.* at 424. The standard has been known by a variety of names, but "usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal,' and 'convincing.'" *Id.* at 424. Examples of proceedings in which the Court has found a heightened standard of proof to be appropriate are proceedings to terminate parental rights, *see Santosky v. Kramer*, 455 U.S. 745 (1982); involuntary commitment proceedings, *see Addington*, 441 U.S. at 432; and deportation proceedings, *see Woodby v. INS*, 385 U.S. 276, 285-86 (1966).

The Court has stated that, in civil actions between private litigants, a standard of proof greater than one of a preponderance of the evidence will only apply in cases in which "'particularly important individual interests or rights are at stake.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-90 (1983)). Thus, a preponderance standard suffices

even in cases in which "severe civil sanctions" may ultimately be imposed, if those sanctions do not implicate particularly important interests or rights. *See Huddleston*, 459 U.S. at 389.[30]

We find that the enforcement of the oral release-dismissal agreement at issue in this case would indeed implicate "important individual interests or rights." Although the Livingstones' section 1983 claims are in form claims for money damages, underlying them is the Livingstones' interest in redressing a possible violation of their constitutional rights.[31] Moreover, section 1983 actions, when successful, do more than compensate injured plaintiffs: they serve the important public purpose of exposing and deterring official misconduct, and thereby protecting the rights of the public at large. In *Rumery*, all nine Justices recognized the importance of ensuring that release-dismissal agreements do not encroach upon this purpose. *See Rumery*, 400 U.S. at 395; *id.* at 400 (O'Connor, J., concurring); *id.* at 419 (Stevens, J., dissenting).[32]

A clear-and-convincing standard appropriately allocates more of the risk of error associated with oral release-dismissal agreements to those who seek to enforce them. As

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30. An apt example is in a § 10(b) securities fraud claim, in which the Court has found that a preponderance standard is appropriate, because in such a case there is no reason to accord special deference to the interests of either plaintiffs or defendants. *Id.* at 390.

31. The first amendment's petition clause protects a citizen's right of access to governmental mechanisms for the redress of grievances, including the right of access to the courts for that purpose. *See Bieregu v. Reno*, 59 F.3d 1445, 1453 (3d Cir. 1995); *San Filippo v. Bongiovanni*, 30 F.3d 424, 439 n.18, 443 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 735 (1995).

32. It is appropriate to include the public's interest in detecting and deterring official abuse among the "particularly important individual interests or rights" that are at stake in a proceeding to determine the enforceability of a release-dismissal agreement. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964) (finding that actual malice must be demonstrated with "convincing clarity" in a libel action, and citing the public's interest in protecting those who would criticize official conduct from the expense and risk of litigation).

we noted in *Livingstone I*, oral release-dismissal agreements raise particularly significant questions of voluntariness, as the lack of a written document may inhibit negotiation as to an agreement's terms and render it difficult for prospective parties to reflect on those terms. We also observed in *Livingstone I* that an oral agreement ordinarily contains less evidence as to the course of the parties' negotiations than does a written agreement. As a result, there is a greater risk of error in a jury's evaluation of whether an oral release-dismissal agreement was concluded voluntarily.

We think that those seeking to enforce a release-dismissal agreement should bear this greater risk. Indeed, a "clear and convincing" standard will encourage prosecutors who are likely to have comparatively frequent contact with release-dismissal agreements, and who have an interest in ensuring that those agreements are later found to be enforceable — to ensure that release-dismissal agreements are, whenever possible, written down. The standard will therefore have the salutary effect of reducing the overall risk of misunderstandings in the conclusion of release-dismissal agreements, and increasing the accuracy of juries' decisions as to whether a release-dismissal agreement was concluded voluntarily.[33]

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33. We note that there is some analogy between the rule that we apply today and the Statute of Frauds, which requires that certain important contracts be in writing in order to be enforceable. The Statute of Frauds is intended, *inter alia*, to encourage caution in consummating important transactions, and to ensure that there is reliable evidence that a transaction occurred and of its terms. *See Restatement (Second) of Contracts* § 110 statutory note at 286 (1981). The surrender of civil rights claims in a release-dismissal agreement is an important transaction. Moreover, that transaction ordinarily occurs while criminal charges are pending against one of the parties. Encouraging the parties to write their agreement down renders it less likely that one of them will act in haste. *Cf. Restatement (Second) of Contracts* § 112 cmt. a (1981) (noting that the inclusion of suretyship contracts in the Statute of Frauds "serves the cautionary function of guarding the promisor against ill-considered action").

Section 139 of the Restatement (Second) of Contracts, "Enforcement by Virtue of Action in Reliance," provides a list of circumstances relevant to whether an oral agreement should be enforced despite the Statute of Frauds. This list includes "the extent to which . . . the making and terms [of the agreement] are . . . established *by clear and convincing evidence*." *See Restatement (Second) of Contracts* § 139 (1981) (emphasis added).

Since, when this case was first remanded, the parties challenging the enforceability of the Livingstones' oral release-dismissal agreement were only required to establish the voluntariness of the agreement under a preponderance-of-the-evidence standard, the jury's finding of voluntariness will be vacated. If, on this remand, it again becomes necessary to address the issue of voluntariness, the more demanding clear-and-convincing standard will be utilized.[34]

B. *Instruction on Existence of a Legitimate Criminal Justice Objective.*

The Livingstones sought to have the district court instruct the jury that one of the factors for it to consider in determining whether they voluntarily entered into the release-dismissal agreement was "whether there is a l[e]gitimate criminal justice objective to support [the agreement's] validity." Livingstones' Proposed Jury Instruction 10, App. at 394. The district court declined to so instruct; the Livingstones contend that this was error.

Evidently the rationale for the proposed instruction was that the Livingstones sought to argue to the jury that elements of the public-interest analysis should enter into the jury's evaluation of whether the agreement was voluntary. We see no reason why the public-interest issue is pertinent to the jury's consideration of the voluntariness issue, and we therefore think the district court was correct in concluding that such an instruction would have been inappropriate.

C. *Admission of Ceraso's Testimony.*

The district court found that, by challenging the release-dismissal agreement, the Livingstones had waived any claim of attorney-client privilege as to the testimony of Ceraso, Mrs. Livingstone's lawyer at her criminal

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34. Appellants do not raise the question whether all oral release-dismissal agreements are unenforceable as a matter of law. *Livingstone I* declined to reach this issue, *see Livingstone I*, 12 F.3d at 1212, and so do we; our discussion of the standard of proof of voluntariness should not be read to indicate that we have decided this question. We also note that we need not, and do not, address the appropriate standard of proof for enforcement of a written release-dismissal agreement.

proceeding.[35] Accordingly, the district court permitted Ceraso to be deposed, and then allowed him to be called as a witness at the voluntariness proceeding. App. at 101. On appeal, the Livingstones argue that this decision was erroneous. We disagree.

"The attorney-client privilege is waived for any relevant communication if the client asserts as a material issue in a proceeding that: (a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct." *Restatement of the Law Governing Lawyers* § 130(1) (Final Draft No. 1, 1996); *see also Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) ("[A] party can waive the attorney client privilege by asserting claims that put his or her attorney's advice in issue in the litigation."). The Livingstones' complaint states that Washington Township "may seek to assert as a possible defense a purported agreement not to sue and/or release," but that the Township "will not be able to sustain its burden that the same was entered into in a knowing and voluntary fashion." App. at 21. The complaint goes on to state that the agreement was not "knowing" because "[p]laintiffs, at the time, were unaware that the same could be interpreted as foregoing a damage claim. They specifically were unaware of the precise extent of any claimed waiver." App. at 22. The Livingstones made similar claims before the district court and on appeal.

Mrs. Livingstone was represented by counsel at her criminal trial; her attorney played a central role in the negotiation of the release-dismissal agreement. Under *Rumery*, the advice of counsel is an explicit, and important, element of the voluntariness analysis. *See Rumery*, 480 U.S. at 394; *id.* at 401 (O'Connor, J., concurring) (citing, as one of the factors bearing on the enforceability of a release-

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35. Ceraso described himself in his testimony at the voluntariness proceeding as effectively representing both Mr. and Mrs. Livingstone in the negotiation of the release-dismissal agreement. App. at 719. There is, however, no indication in the record that he had any formal agreement with Mr. Livingstone on this subject, and we therefore will treat only Mrs. Livingstone as Ceraso's client.

dismissal agreement, "importantly, whether the defendant was counseled").[36] Mrs. Livingstone's assertion that she did not appreciate the release-dismissal agreement's legal implications is tantamount to a claim that her attorney did not give her accurate legal advice. It would be unfair to allow her to make this claim without permitting the opposing parties to investigate her attorney's version of the relevant events. *See United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.), *cert. denied*, 502 U.S. 813 (1991) (holding that a party who asserts a claim that "in fairness requires examination of protected communications" thereby waives the attorney-client privilege as to those communications). In the terms of the draft Restatement, Mrs. Livingstone has effectively asserted that the advice provided to her by her attorney is "relevant to the legal significance of [her] conduct." Accordingly, we find no error in the district court's ruling that the attorney-client privilege had been waived.[37]

D. *Exclusion of Expert Testimony.*

The Livingstones challenge the district court's decision, at the voluntariness proceeding, to exclude the testimony of their expert, John Peters, who had prepared a report addressing the underlying liability of the police officers and of Washington Township. Mrs. Livingstone's attorney, Ceraso, had testified that he had advised Mrs. Livingstone to conclude a release-dismissal agreement because any

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36. This fact distinguishes the present case from *Rhone-Poulenc*, in which we found that a client who made reference to the advice of counsel in seeking to establish his state of mind did not thereby waive the attorney-client privilege as to that advice. In *Rhone-Poulenc*, only the client's state of mind, and not the substance of counsel's advice, was an explicit element of the relevant legal analysis. *See* 32 F.3d at 864. In *Rumery*, by contrast, the Supreme Court made the advice of counsel an explicit element of the voluntariness analysis.

37. We emphasize that this waiver is a limited one. *See Greater Newburyport Clamshell Alliance v. Public Service Company of New Hampshire*, 838 F.2d 13, 22 (1st Cir. 1988) (finding, after conducting a balancing analysis, that the plaintiffs had waived the attorney-client privilege in some respects, but only as to information for which the defendants had "shown a true need and without which they would be unfairly prejudiced in their defense").

damages that she would recover in a subsequent civil suit would have been largely, or completely, offset by the damages that the police officers would recover, assuming that they filed counterclaims. App. at 767. The plaintiffs sought to introduce Peters' testimony in order to demonstrate that Ceraso's advice had been inaccurate. The district court found that Peters' testimony was inadmissible under Rule 702, because it would not assist the trier of fact to understand the evidence, and under Rule 403, because of prejudice, confusion of the issues, misleading the jury, and waste of time. App. at 777.

We will address only the district court's application of Rule 403, which we find was entirely appropriate. Peters' report was quite likely to be prejudicial; it asserted, in considerable detail, that Washington Township and the police-officer defendants had violated Mrs. Livingstone's civil rights.[38] A jury presented with a substantial amount of information on the merits of an underlying civil rights action might well look to those merits in making its decision on the distinct — and distinctly different — issue of voluntariness, thus creating a significant risk of prejudice.

Rule 403 requires that a court balance the prejudicial effect of proposed evidence against its probative value. If evidence that a party to a release-dismissal agreement had received improper legal advice is of sufficient probative value, this analysis may well weigh in favor of admissibility.[39]

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38. His report concluded, for instance, that Officer Monack "knew or should have known that he was not properly trained to use and/or carry the Nova 5000 [stun gun]." App. at 635; that "Washington Township . . . knew or should have known that its police were not properly trained to carry the Nova 5000," and that this knowledge "amounted to deliberate indifference." App. at 634; that "Officer Monack illegally re-entered the Livingstone residence, after he left the house." App. at 636; that "Officers Monack, Snyder and Moody used unreasonable and excessive force on Frances Livingstone." App. at 640; and that "the charges filed against Mrs. Livingstone were 'cover charges' to justify both her arrest and the officers' excessive and unreasonable use of force." App. at 647.

39. Otherwise, it would be difficult or impossible for a plaintiff to establish that incorrect legal advice had rendered a release-dismissal agreement involuntary.

The probative value of Peters' testimony was not, however, high, as it did not engage Ceraso's testimony directly. Ceraso's advice to Mrs. Livingstone had addressed the net award of damages that she could expect from her potential civil suit against the police and their potential civil suit against her. Peters' report only barely touched on the merits of a possible civil suit by the police against Mrs. Livingstone, and did not discuss the likely award of damages in either suit.[40] Thus, his testimony would not have greatly helped the jury to understand the correctness of Ceraso's advice.[41]

E. *Exclusion of Trial Transcript.*

At the trial of the voluntariness issue, counsel for the Livingstones sought to introduce into evidence an exchange between Heneks and Judge Cicchetti that occurred the day before the release-dismissal agreement purportedly was concluded. The district court found that this exchange was not relevant, and excluded it. The Livingstones appeal this ruling, asserting that Judge Cicchetti's comments in the exchange that they sought to introduce resembled his later remarks at the release-dismissal colloquy, and that the Livingstones might have been misled into believing that he was simply repeating his earlier comments. We agree with the district court's finding that this exchange is not relevant. Judge Cicchetti's comments in the portion of the exchange presented to the district court, App. at 790, bore little resemblance to his later comments at the release-dismissal proceeding, Appellees' App. at 32.

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40. Peters' report did state that the criminal charges against Mrs. Livingstone had been "manufactured." App. at 647. The reasoning that led him to this conclusion was far from clear, however; indeed, his report stated that this opinion "will be further developed upon reading the Pennsylvania Crimes Code regarding these offenses." *Id.*

41. We also note that there is some authority suggesting that the qualifications of experts on police practices should be subjected to close scrutiny. *See, e.g., Berry v. City of Detroit*, 25 F.3d 1342, 1349 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995). The district court did not reach the question of Mr. Peters' qualifications to testify as an expert.

VI. Application of Pennsylvania Law to the Livingstones' State-Law Claims.

As we noted in our discussion of the procedural history of this case, the district court dismissed a number of the Livingstones' state-law claims on grounds, such as the statute of limitations, unrelated to the release-dismissal agreement. The dismissal of those claims is not before us on appeal. The remaining state-law claims included claims of assault and battery against defendants Monack and Snyder; a claim of intentional infliction of emotional distress against defendants Monack, Snyder, and Moody; and a claim of conversion against all defendants.

Neither the parties nor the district court have discussed what standard applies to determine the enforceability of the release-dismissal agreement as to the state-law claims. Instead, they have apparently assumed that the standard applicable to these claims is no different from that applicable to section 1983 claims. This is not necessarily true; the question whether the Livingstones have waived their claims under state law is itself one of state law, *see Livingstone I*, 12 F.3d at 1210 n.6, and state law cannot be assumed to parallel federal law on this question.

In *Livingstone I*, we observed that the courts of Pennsylvania "frequently follow the principles set forth in the Restatement [of Contracts]," *id.*, and suggested that the Pennsylvania Supreme Court might be likely to do as the United States Supreme Court did in *Rumery*, and look to the public-interest analysis in the Restatement of Contracts to determine when it is appropriate to enforce a release-dismissal agreement. *See id.* However, we did not then have occasion to decide precisely what standard Pennsylvania would apply to the enforcement of a release-dismissal agreement. That question is now before us. Indeed, that question subsumes two distinct questions: (1) What standard would Pennsylvania courts be likely to apply to determine whether the enforcement of a release-dismissal agreement is in the public interest? (2) What standard would Pennsylvania courts be likely to apply to determine the voluntariness of a release-dismissal agreement?

A. *Public Interest*

We have discovered no reported Pennsylvania cases addressing the question of when, if ever, it is in the public

interest to enforce a release-dismissal agreement. Our analysis of the caselaw and policies of the Commonwealth of Pennsylvania has persuaded us, however, that the Supreme Court of Pennsylvania would apply a public-interest standard resembling that applied under federal law.

The courts of Pennsylvania have long declined to enforce contracts that are contrary to public policy. *See, e.g., Kuhn v. Buhl*, 96 A. 977 (Pa. 1916) (finding unenforceable as against public policy an agreement between bidders for public lands under which one of them would, in exchange for a fee, withdraw its bid). After *Kuhn*, the Supreme Court of Pennsylvania accepted the standard set forth in section 320(1) of Tentative Draft No. 12 of the Restatement (Second) of Contracts (March 1, 1977) as its standard for the nonenforcement of contracts as against public policy. *See Central Dauphin School District v. American Casualty Co.*, 426 A.2d 94, 96 (Pa. 1981). Section 320(1) of the Tentative Draft was to emerge (with one minor stylistic alteration not relevant here) as Section 178(1) of the Restatement (Second) as finally adopted. It provides that "[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." *Restatement (Second) of Contracts* § 178(1) (1981). We may reasonably conclude — as the Pennsylvania Superior Court has already concluded, *see Donegal Mutual Insurance Co. v. Long*, 564 A.2d 937, 942 (Pa. Super. 1989) — that the Pennsylvania Supreme Court, having accepted tentative section 320(1) in *Central Dauphin*, would now accept permanent section 178(1).

In *Rumery*, the Supreme Court drew upon section 178(1) to fashion its federal common-law rule that a release-dismissal agreement will be unenforceable "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery*, 480 U.S. at 392 & n.2. We think that the Pennsylvania Supreme Court would not only draw on section 178(1) in considering the enforceability of a release-dismissal agreement but, in construing that section's open

language, would look to *Rumery* and its progeny in the courts of appeals as persuasive authority. The Pennsylvania Supreme Court would, of course, also consider the policies of the Commonwealth of Pennsylvania, as expressed in the Commonwealth's statutes and common law. The Pennsylvania Supreme Court has treated Pennsylvania's common law as an important instrument for curbing official misconduct, paralleling at the level of state law the United States Supreme Court's view of the policies underlying section 1983. *See, e.g. Supervisors of Lewis Township v. Employers Mutual Casualty Co.*, 523 A.2d 719, 722 (Pa. 1987) (finding that permitting insurance coverage of willful or fraudulent conduct on the part of a public official is contrary to Pennsylvania law and public policy, as personal financial liability is intended to deter official misconduct). We therefore conclude that the Pennsylvania Supreme Court would subject agreements that purport to waive tort liability to at least as careful scrutiny as the United States Supreme Court has applied to agreements purporting to waive liability under section 1983.

The Livingstones argue that the law of the Commonwealth of Pennsylvania strictly limits the private resolution of criminal charges. In support of this claim, they cite Pennsylvania Rule of Criminal Procedure 314, a rule permitting a form of court-supervised settlement in certain types of criminal cases. That rule provides:

> When a defendant is charged with an offense which is not alleged to have been committed by force or violence or threat thereof, the court may order the case to be dismissed upon motion and a showing that:
>
> (a) the public interest will not be adversely affected;
>
> (b) the attorney for the Commonwealth consents to the dismissal;
>
> (c) satisfaction has been made to the aggrieved person or there is an agreement that satisfaction will be made to the aggrieved person;
>
> (d) there is an agreement as to who shall pay the costs.

Pa. R. Crim. P. 314. The Livingstones assert that the fact that this rule does not permit settlements in the case of offenses "alleged to have been committed by force or violence or threat thereof" implies that such settlements are disfavored, or perhaps prohibited, under Pennsylvania law.

We are not persuaded that Rule 314 demonstrates that Pennsylvania would not permit release-dismissal agreements in other situations. A prosecutor who has sound public-interest reasons for declining to go forward with a prosecution, or for terminating a prosecution after it has begun, must have the authority to do so. As a corollary of this authority, a prosecutor presumably also has the authority to condition a dismissal on some undertaking by the defendant.[42]

We find, however, that Rule 314 demonstrates that the courts of Pennsylvania would be likely to subject release-dismissal agreements to close scrutiny. Further, the fact that Rule 314(a) requires that a judge determine that "the public interest will not be adversely affected" by a dismissal demonstrates the Commonwealth's commitment to reviewing release-dismissal agreements for their impact on the public interest. The Pennsylvania courts have also read Rule 314's limitations on the circumstances in which criminal prosecutions may be dismissed to indicate that "the law does not favor out-of-court compromise over prosecution." *Commonwealth v. Pettinato*, 520 A.2d 437, 439 (Pa. Super. 1987) (concluding that an offer from a criminal defendant to pay a complainant a fee in exchange for her agreement not to testify was admissible into evidence in the defendant's criminal trial; because Rule 314

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42. Consider what would occur if a case like *Rumery* arose in the Commonwealth of Pennsylvania. Rumery had been charged with witness-tampering. Because he had allegedly threatened the witness with death, this was an offense "committed by force or violence or threat thereof"; thus, Rumery would not have been entitled to a dismissal under Rule 314. Nevertheless, given the strength of the public interests cited by the *Rumery* Court as supporting enforcement of the release-dismissal agreement in that case, we predict that the Pennsylvania Supreme Court would conclude that Rule 314 does not deprive prosecutors of the power to conclude release-dismissal agreements in at least some situations involving violent crimes.

strictly limits consensual dismissals in criminal cases, the civil rule of evidence barring the admission of offers of settlement into evidence did not apply).

In summary, then, we find that Pennsylvania would be likely to permit release-dismissal agreements to be enforced in some cases, but would monitor them closely to ensure that their enforcement is in the public interest. The federal rule, which places the burden of proving that a release-dismissal agreement is in the public interest on those seeking to enforce the agreement, has the same goals. Pennsylvania would therefore be likely to apply a very similar rule.

B. *Voluntariness*

The Court observed in *Rumery* that private citizens are permitted to waive their constitutional rights in many circumstances. For instance, criminal defendants may waive constitutional rights through plea bargaining, and the resulting agreements are ordinarily enforced if they are voluntary. Voluntary release-dismissal agreements, *Rumery* reasoned, should therefore also be permitted. *See* 480 U.S. at 393-94.

Pennsylvania, too, permits plea bargaining, *see, e.g., Commonwealth v. Spence*, 627 A.2d 1176, 1184 (Pa. 1993), and will uphold a guilty plea if it is knowing and voluntary, *see Commonwealth v. Alston*, 373 A.2d 741, 743 (Pa. 1977). We believe that the Pennsylvania Supreme Court would be likely to follow a line of logic similar to that of the Court in *Rumery*, and permit release-dismissal agreements upon a showing of voluntariness.

However, we anticipate that the Pennsylvania Supreme Court would be very attentive to how the voluntariness of a release-dismissal agreement is established. Such judicial attentiveness would be called for both because of the danger that such agreements will be concluded in improper circumstances, and because Pennsylvania has a policy of declining to enforce contracts concluded under duress or threat of prosecution. *See, e.g., Germantown Mfg. Co. v. Rawlinson*, 491 A.2d 138, 143 (Pa. Super. 1985) (applying a rule that threats of criminal prosecution constitute duress rendering a contract voidable, and stating: "It is an

affront to our judicial sensibilities that one person's ability to seek another's prosecution can be bartered and sold the same as commodities in the market place. It is even more repugnant when the foul stench of oppression pervades the transaction."). For reasons we have already discussed, the voluntariness of oral release-dismissal agreements is especially likely to be problematic, and precisely because such agreements are not evidenced by a writing—determinations of the voluntariness of such agreements are particularly likely to be unreliable. *See supra* at 31 - 36. Accordingly, we predict that the Pennsylvania Supreme Court, when faced with the question, will subject the voluntariness of oral release-dismissal agreements to a heightened standard of proof, and we therefore conclude that the voluntariness of the release-dismissal agreement now before us must be demonstrated by clear and convincing evidence.

VII. Conclusion.

For the reasons set forth above, we will vacate the judgment of the district court and remand for further proceedings in accordance with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed August 14, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-3252

FRANCES E. LIVINGSTONE and JOSEPH A. LIVINGSTONE, her husband,

Appellants

v.

NORTH BELLE VERNON BOROUGH; FAYETTE CITY BOROUGH; WASHINGTON TOWNSHIP; FRANK E. MONACK, JR., individually and in his capacity as officer of WASHINGTON TOWNSHIP; OFFICER RAYMOND MOODY, individually and in his capacity as officer for FAYETTE CITY BOROUGH; OFFICER DARHL SNYDER, individually and in his capacity as an officer for NORTH BELLE VERNON BOROUGH

On Appeal from the United States District Court
for the Western District of Pennsylvania

D.C. No. 91-00059

Argued January 25, 1996

Before: COWEN and SAROKIN, *Circuit Judges* and POLLAK, *District Judge**

*.Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

ORDER AMENDING SLIP OPINION

It is hereby ordered that the slip opinion in the above-entitled appeal filed July 31, 1996 be amended in accordance with the following.

On page 9, the second full paragraph should read:

> With this background history as predicate, the court in *Livingstone I* then proceeded to review the elements of proof for a showing of voluntariness, finding that the parties seeking to enforce the release-dismissal agreement bore the burden of showing that the Livingstones' assent was "voluntary, deliberate and informed." 12 F.3d at 1211. We concluded that the defendants had not met this burden with the certainty called for on summary judgment, given that Mrs. Livingstone was confused as to the terms of the release-dismissal arrangement, that the claimed release-dismissal agreement was never written down, and that the asserted agreement — assuming there was a meeting of the minds — was made, if at all, during a brief and ambiguous oral colloquy. *See id.* at 1211-14. Accordingly, we reversed the grant of summary judgment and directed that the case be remanded for further proceedings.

On page 16, the first paragraph should read:

> The Livingstones also question whether North Belle Vernon Borough and Fayette City Borough — which we will refer to, for brevity, as "the two boroughs" — had the same status under the release-dismissal agreement as did Washington Township. In the voluntariness proceeding in the district court, counsel for the Livingstones had requested that a specific question on the verdict form address the status of the two boroughs under the agreement. The district court declined to include such a question on the form, finding that Ceraso's statements in the colloquy before Judge Cicchetti included all three municipalities, and that all

three therefore had the same status for purposes of the voluntariness question. In response to the objections of the Livingstones' counsel to this ruling, the district court permitted him to argue to the jury that the ambiguous nature of the agreement between the Livingstones and the two boroughs rendered the release-dismissal agreement involuntary as a whole. App. at 804-06.

The last paragraph on page 45 continuing on to page 46 should read:

However, we anticipate that the Pennsylvania Supreme Court would be very attentive to how the voluntariness of a release-dismissal agreement is established. Such judicial attentiveness would be called for both because of the danger that such agreements will be concluded in improper circumstances, and because Pennsylvania has a policy of declining to enforce contracts concluded under duress or threat of prosecution. *See, e.g., Germantown Mfg. Co. v. Rawlinson*, 491 A.2d 138, 143 (Pa. Super. 1985) (applying a rule that threats of criminal prosecution constitute duress rendering a contract voidable, and stating: "It is an affront to our judicial sensibilities that one person's ability to seek another's prosecution can be bartered and sold the same as commodities in the market place. It is even more repugnant when the foul stench of oppression pervades the transaction."). For reasons we have already discussed, the voluntariness of oral release-dismissal agreements is especially likely to be problematic, and — precisely because such agreements are not evidenced by a writing — determinations of the voluntariness of such agreements are particularly likely to be unreliable. *See supra* at 31-36. Accordingly, we predict that the Pennsylvania Supreme Court, when faced with the question, will subject the voluntariness of oral release-dismissal agreements to a heightened standard of proof, and we therefore conclude that the voluntariness of the release-dismissal agreement now before us must be demonstrated by clear and convincing evidence.

BY THE COURT:

/s/ Louis H. Pollak

District Judge

DATED: August 14, 1996

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANCES E. LIVINGSTONE and JOSEPH A. LIVINGSTONE, her husband, Plaintiffs,	)	
v.	)	Civil Action 91-59
NORTH BELLE VERNON BOROUGH, FAYETTE CITY BOROUGH, WASHINGTON TOWNSHIP, FRANK E. MONACK, JR., individually and in his capacity as Officer of Washington Township, RAYMOND MOODY, individually and in his capacity as Officer for FAYETTE CITY BOROUGH and DARHL SNYDER, individually and in his capacity as an Officer for NORTH BELLE VERNON BOROUGH, Defendants.	)	

ORDER OF COURT

AND NOW, this 27th day of March, 1995,

IT IS ORDERED that the plaintiffs' motion for a new trial and/or judgment N.O.V. and/or motion to amend or modify judgment, be and hereby is denied for the reasons set forth of record.

(s)
Donald E. Ziegler
Chief Judge

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANCES E. LIVINGSTONE and JOSEPH A. LIVINGSTONE, her husband, Plaintiffs,	)	
v.	)	Civil Action 91-59
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ORDER

AND NOW, this 27th day of January, 1995, after consideration of the submissions of the parties,

IT IS ORDERED that the motion of plaintiffs, Frances E. Livingstone and Joseph A. Livingstone, for partial summary judgment (document number 93) be and hereby is denied.

IT IS FURTHER ORDERED that the motions of defendants, North Belle Vernon Borough, Fayette City Borough, Washington Township, Frank Monack, Jr., Raymond Moody and Darhl Snyder, for partial summary judgment (document numbers 100, 102 and 105), be and hereby are granted.

Donald E. Ziegler
Chief Judge

cc: Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANCES E. LIVINGSTONE and JOSEPH A. LIVINGSTONE, her husband, Plaintiffs,	)	
v.	)	Civil Action 91-59
NORTH BELLE VERNON BOROUGH, FAYETTE CITY BOROUGH, WASHINGTON TOWNSHIP, FRANK E. MONACK, JR., individually and in his capacity as Officer of Washington Township, RAYMOND MOODY, individually and in his capacity as Officer for FAYETTE CITY BOROUGH and DARHL SNYDER, individually and in his capacity as an Officer Defendants.	)	

OPINION

ZIEGLER, Chief Judge

Pending before the court is the motion of plaintiffs, Frances and Joseph Livingstone, for partial summary judgment. Also pending are the cross motions for partial summary judgment filed by defendants, North Belle Vernon Borough, Washington Township, Fayette City Borough, Frank Monack, Jr., Officer Raymond Moody and Officer Darhl Snyder.

Because all parties have moved for partial summary judgment, we must evaluate the motions separately and, in each instance, draw factual inferences most favorable to the opposing party. Arnold Pontiac-GMC, Inc. v. General Motors Corp., 700 F.Supp. 838 (W.D.Pa. 1988); accord L.L. Bean, Inc. v. Drake

Publishers, Inc., 811 F.2d 26 (1st Cir. cert. denied, 483 U.S. 1013 (1987) (citation omitted). We must grant summary judgment if we find that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c).

This civil action arises from an incident in which defendant police officers responded to a domestic complaint involving plaintiffs, their daughter and her child. As a result of an altercation which arose between Mrs. Livingstone and the police officers, Mrs. Livingstone was arrested and charged with disorderly conduct, aggravated assault, terroristic threats, resisting arrest and interference with child custody. Attorney Thomas Ceraso, a highly regarded criminal defense lawyer, represented Mrs. Livingstone throughout the criminal proceedings. On the third day of trial, a release-settlement agreement was executed whereby the criminal case against Mrs. Livingstone would be dismissed upon motion for judgment of acquittal by Mr. Ceraso in exchange for a mutual release of any civil claims and an agreement by the municipalities to pay Mrs. Livingstone's expenses and reasonable medical costs.

We note that summary judgment was previously granted in this action based on the release-settlement agreement. The Court of Appeals reversed because it found that there was a genuine issue of material fact as to whether Mrs. Livingstone's assent to the agreement was voluntary. Livingstone v. North Belle Vernon Borough, 12 F.3d 1205 (3d Cir. 1993).

Plaintiffs now contend that the agreement is invalid and therefore unenforceable because it was never formally ratified by the municipalities. We disagree and therefore was will grant partial summary judgment in favor of defendants for the reasons that follow.

Defendants contend that since plaintiffs failed to submit the bills for property damage and medical costs, the municipalities were unable to approve the expenditure. Defendants maintain that the appropriation would have been approved if plaintiffs had submitted the bills. Plaintiffs do not

dispute that the bills were never submitted to either attorney Ceraso or the township supervisors for approval. In addition, there is no evidence that the township was unwilling or fiscally unable to satisfy the agreement. In our view, plaintiffs' failure to forward the relevant information was a material breach of a condition of the contract which was necessary for defendants to perform. See e.g. Restatement (Second) of Contracts § 237 cmt. a (1981). Here, the agreement was not reduced to writing; however a transcript of an in camera colloquy is available which reveals the terms of the contract. Mr. Ceraso stated on the record that Washington Township would arrange for payment of reasonable medical bills together with bills reflecting the damage incurred at the Livingstones' household after attorney Ceraso forwarded the bills to Washington township. The transcript establishes that the parties intended that plaintiffs were required to submit their bills before payment could be effected. We find that plaintiffs' cooperation in providing the relevant information was necessary to defendants' duty to approve and disburse the payments to plaintiffs. Plaintiffs concede that the public fisc cannot be allocated for an indefinite amount to a private party, and plaintiffs have offered no explanation for their failure to submit the bills. We conclude that plaintiffs breached their duty of good faith and fair dealing. See Restatement (Second) of Contract § 205. Because plaintiffs rendered performance by defendants impossible, we will preclude them from taking advantage of their own material breach to invalidate the underlying agreement.

Next, plaintiffs argue that the agreement is void as against public policy. First, the Livingstones contend that the agreement is contrary to Rule 314 of the Pennsylvania Rules of Criminal Procedure. The rule provides that, upon showing of four criteria, a court may order a case to be dismissed when a defendant is charged with an offense which does not involve force or violence or threat thereof. Pa.R.Crim.P., Rule 314, 42 Pa.C.S.A. Plaintiffs contend that the rule should not have been utilized because the charges against Mrs. Livingstone included resisting arrest and assaulting a police officer, which, by their nature, are committed by force or violence. We reject plaintiffs

argument because the record is clear that the case was dismissed upon a motion for judgment of acquittal by attorney Ceraso under Rule 1124 of the Pennsylvania Rules of Criminal Procedure. We therefore need not consider whether the dismissal met the requirements under Rule 314.

Plaintiffs also contend that the agreement does not meet the requirements of Town of Newton v. Rumery, 480 U.S. 386 (1987), in which the Supreme Court considered the validity of release-dismissal agreements. The Court held that such agreements must meet three requirements in order to be enforceable. They must be executed voluntarily, free from prosecutorial misconduct and may not offend the relevant public interest. Id. at 380. The Court of Appeals has already determined that the voluntariness of Mrs. Livingstone's assent is a genuine issue of material fact in this case and we are precluded from summarily deciding that issue at this juncture. Whether the agreement is a result of prosecutorial misconduct or is contrary to the public interest are appropriate issues for summary judgment. See Hill v. City of Cleveland, 12 F.3d 575, 579 (6th Cir. 1993).

Here, there is no evidence of prosecutorial overreaching. The charges against Mrs. Livingstone were filed the day after the incident. The charges also correspond to the relevant conduct of Mrs. Livingstone according to the statement taken from Carrie Livingstone, and the affidavit which supports the complaint. In fact, for reasons which are not stated, the complaint against Mrs. Livingstone was amended at the preliminary hearing to reduce the charge of aggravated assault to simple assault. Finally, discussions of settlement were initiated after nearly three days of testimony in the criminal trial. We find that there is no evidence of prosecutorial misconduct under the circumstances.

We also conclude that the release-settlement agreement, if voluntarily executed, does not offend the public interest. The standard for determining whether a release meets the public interest is an objective one, based on facts known to the prosecutor when the agreement was reached. Cain v. Darby

Borough, 7 F.3d 377 (3d Cir. 1993). The Court in Rumery recognized that there can be a legitimate law enforcement interest in preventing the public fisc from being wasted by defending frivolous lawsuits. If the prosecutor's actual motivation in allowing the dismissal of criminal charges was to avoid the time and expense of defending a marginal or frivolous lawsuit, the public interest is served. See Cain v. Darby Borough, 7 F.3d 377, 381 (3d Cir. 1993).

Here, Judge Cichetti, who presided over the criminal trial against Mrs. Livingstone and who supervised the execution of the release-settlement agreement, stated in the colloquy that he was supportive of the agreement because he saw no benefit to a criminal trial and that it was in everyone's best interest to resolve the matter. Mr. Heneks, the assistant district attorney who was assigned to the case stated that he believed that the Commonwealth would be well-served by the resolution as well. Later, in a sworn statement, Mr. Heneks indicated that continuation of the criminal trial would have created further conflict between the Livingstones and their daughter who had reconciled their differences since the night of the incident. In addition, he stated that the agreement saved the Commonwealth from spending further resources to prosecute. The reasons state by Mr. Heneks are factors which were known to him at the time the agreement was executed. In the absence of evidence that the motivation was improper, we may accept his explanation. In addition, each reason constitutes an independent, legitimate reason which is directly related to his prosecutorial responsibilities. See Rumery, 480 U.S. at 398.

Having found no genuine issue as to any material fact the issue of the validity of the agreement and drawing the factual inferences in the light most favorable to plaintiffs, as we must, we will grant partial summary judgment in favor of defendants.

We have considered the remaining contentions of plaintiffs and find them without merit. An appropriate order will follow.

Dated: January 27, 1995

Donald E. Ziegler
Chief Judge

cc: Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANCES E. LIVINGSTONE and JOSEPH A. LIVINGSTONE, her husband, Plaintiffs,	)	
v.	)	Civil Action 91-59
NORTH BELLE VERNON BOROUGH, FAYETTE CITY BOROUGH, WASHINGTON TOWNSHIP, FRANK E. MONACK, JR., individually and in his capacity as Officer of Washington Township, RAYMOND MOODY, individually and in his capacity as Officer for FAYETTE CITY BOROUGH and DARHL SNYDER, individually and in his capacity as an Officer for NORTH BELLE VERNON BOROUGH, Defendants.	)	

Report and Recommendation

Recommendation:

It is respectfully recommended that the supplemental motion to dismiss and/or for summary judgment brought by Washington Township and Officer Frank E. Monack, Jr. (Docket No. 47) and the motion for summary judgment submitted on behalf on North Belle Vernon Borough and Officer Darhl Snyder (Docket No. 51) be granted as to Counts III, IV and V and denied as to all other claims, and that the motion to dismiss and/or for summary judgment filed by Fayette City Borough and Officer Raymond Moody (Docket No. 56) be granted as to Counts II, III, IV and V and denied as to all other claims.

Report:

Presently before the Court for disposition are motions to dismiss and/or for summary judgment brought by defendants Fayette City Borough and its Chief of Police, Raymond Moody, and Washington Township and its Chief of Police, Frank E. Monack, Jr.[1], as well as a motion for summary judgment submitted on behalf of North Belle Vernon Borough and its police officer, Darhl Snyder.

The plaintiffs, Frances E. Livingstone and Joseph A. Livingstone, her husband, commenced this action against the defendant municipalities and police officials for allegedly violating their civil rights on the evening of January 12-13, 1989, when Monack, Moody and Snyder responded to a domestic dispute at the plaintiffs' residence in Belle Vernon, Pennsylvania. At the time of the events in question, the plaintiffs' twenty-one year old daughter, Carrie Livingstone, and her fourteen-month old son were residing with the plaintiffs in their home. During the late evening hours of January 12, 1989, a disturbance erupted at the plaintiffs' residence between the plaintiffs and their daughter during which Joseph Livingstone struck his daughter causing her to sustain facial injuries. Carrie then informed her parents that she intended to take her son and leave the plaintiffs' home. When the plaintiffs refused to permit Carrie to take her son, she exited the residence and proceeded to the community ambulance service station across the street from the house. There, the police were summoned, and Officer Monack of the Washington Township police department arrived and was informed of the events.

When Carrie made arrangements to stay at the home of a friend, Officer Monack summoned assistance to aid him in securing Carrie's child. In response to Monack's request, Officer Snyder of North Belle Vernon and Chief Moody of

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[1] At the time of the incident in question, Monack was an officer in the Washington Township Police Department.

Fayette City arrive.[2] Monack, Snyder and Moody then proceeded to the Livingstone residence to remove the child.

At the Livingstone residence, Mr. Livingstone invited the officers in. After a brief discussion, the officers accompanied Mr. Livingstone outside, and he agreed to go to the police station to make a statement. The officers then reentered the plaintiffs' home without a warrant or court order for the purpose of removing the child, whereupon Mrs. Livingstone locked herself in a back bedroom with the child. Officer Monack picked the lock on the door and tried opening it, but Mrs. Livingstone hit him with a fishing rod and scratched him. Monack and Snyder then broke down the door and arrested Mrs. Livingstone.

During the course of the arrest, force was employed to restrain Mrs. Livingstone. She avers that Monack and Snyder both struck her, causing her to lose consciousness and sustain bruises, lost teeth and head injuries; that Monack told her "you want a thrill, I'll give you a thrill" and applied a stun gun between her legs; and that after she was handcuffed, the officers dragged her outside, dropped her several times and banged her head, and then left her lying in cold muddy waters for hours.

On January 13, 1989, Mrs. Livingstone was charged with disorderly conduct, aggravated assault, terroristic threats, resisting arrest and interference with custody by Officer Monack. After a probable cause hearing the matter was referred to the Court of Common Pleas where it came to trial. On the third day of trial the court entered an Order dismissing the case as a result of an oral settlement agreement ("the

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[2] The defendant municipalities were party to an "Intermunicipal Police Coorperation Agreement" (See: Joint Appendix, Exhibit A) which is discussed more fully herein.

settlement") allegedly entered into by the parties.[3]

In their instant complaint, the plaintiffs assert causes of action against all defendants for violations of their civil rights (Count I) and conversion (Count VII). They also bring supplemental claims against Monack, Moody and Snyder for assault and battery (Count II), malicious prosecution (Count III), malicious abuse of process (Count IV), invasion of privacy (Count V) and intentional infliction of mental distress (Count VI).

The defendants have filed motions to dismiss and/or for summary judgment, which the Court will treat as motions for summary judgment.[4] Summary judgment is appropriate where there are no material factual issues in dispute and the movant is entitled to judgment as a matter of law. Travitz v. Northeast, 13 F.3d 704 (3d Cir. 1994).

With respect to the plaintiffs' claim in Count I for violations of their civil rights, the municipalities argue that the plaintiffs have failed to establish the existence of a policy or custom that its officers executed which caused the plaintiffs'

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[3] The nature and scope of that "settlement" are discussed more fully in Livingstone v. North Belle Vernon Borough, 12 F.3d 1205 (3d Cir. 1993), where the Third Circuit vacated this Court's Order of April 24, 1992 which granted all defendants' motions for summary judgment based upon the settlement and remanded the matter for further proceedings. In light of the Third Circuit's conclusion that a material question of fact exists as to whether the plaintiffs' assent to the settlement was voluntary, deliberate and informed, we now consider other defenses raised by the defendants.

[4] Federal Rule of Civil Procedure 12(b)(6) provides that where on a motion to dismiss, matters outside the complaint are considered, the motion should be treated as one for summary judgment. Here, the parties have submitted extensive relevant documentation in support of their respective positions.

harm. In the complaint at paragraph 28, the plaintiffs have alleged that the municipalities established and pursued the following policies or customs: (a) "encourag[ing] the utilization of criminal process to coerce the surrender of civil rights"; (b) "failing to properly educate, train or otherwise inform their officers of the basic requirements of law concerning the need for search warrants, arrest warrants...and/or forcing child custody transfers"; (c) "failing to provide appropriate training and/or instruction...in the utilization of force, particularly the application of high voltage stun guns to citizens"; and (d) "encourag]ing] the instant conduct, by failing to take any disciplinary action whatsoever...[and ratifying the wrongful conduct] by the promotion of defendant Officer Monack to the position of Chief of Police."

The Supreme Court has held that a municipality may be held liable under section 1983 where conduct pursuant to its policy or custom causes a constitutional violation. Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 691 (1978). A municipality may be held liable fore inadequate police training if its failure to train amounts to a deliberate indifference to the rights of people with whom its police come in contact. City of Canton, Ohio v. Harris, 489 U.S. 378, 388 (1989). "To meet the deliberate indifference standard, the failure to train must reflect a deliberate or conscious choice made by the city policymakers." Fagan v. City of Vineland, No. 92-5481, et al., slip op. at 16 (3d Cir. April 29, 1994), citing City of Canton, supra, 489 U.S. at 389. "[A] plaintiff must also show that the city's policy actually caused a constitutional injury." Id.

At the time of the events in question, the defendant municipalities were party to an Intermunicipal Police Cooperation Agreement ("Police Agreement") so as to establish mutual aid or assistance in police protection.[5] The Police Agreement provides that when a participating municipality places a call for police assistance, officers from other

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[5] See, Joint Appendix, Exhibit A.

participating municipalities may be transferred for duty in the municipality requesting the assistance. When officers from other municipalities are summoned for assistance, as occurred here (i.e., Office Monack of Washington Township requested assistance and was aided by Officer Moody of Fayette City Borough and Officer Snyder of North Belle Vernon Borough), their duty is to follow the instructions and lead of the officer whose township they are in, thereby adhering to that township's policies.[6] In this case then, Officers Moody and Snyder were obligated to follow the instructions of Officer Monack concerning their police duties.[7] Thus, it would appear that the defendant municipalities maintained a policy, pursuant to the Police Agreement, whereby they agreed to accept and abide by the practices of the township that summoned their officers.

According to Robert Matthews, the Chief of Police of Washington County at the time of the incident, when domestic disputes arise involving the custody of a child, Washington County police follow a policy of going into a home, taking the child, and giving it to its mother, regardless of the child's welfare.[8] Mr. Matthews did not say that the township's policy required an officer to secure a search warrant or arrest warrant or obtain legal authority before entering a home, and as discussed above, the officers entered the plaintiffs' home without having obtained a warrant or court order.

The record also shows that none of the defendant municipalities had a training program to instruct its officers on how to use a stun gun. This was so even though the municipalities' police departments issued stun guns to its officers. An officer's only guide on how to use the stun gun was gleaned from reading the instructions that came with the

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[6] See, deposition of Frank Monack, Jr. at pp 46-53.

[7] Id.

[8] See, transcript of criminal trial at pp. 176-179.

device[9] or from having another officer explain how it worked.[10] Officer Monack admitted that he had difficulties in utilizing the device prior to this incident.[11]

Based upon its failure to train officers to properly utilize stun guns, a reasonable jury could find that the municipalities were deliberately indifferent to the plaintiffs' civil rights. Likewise, material questions of fact exist as to whether: (1) the aforementioned policy of Washington Township in handling domestic disputes involving child custody led to conduct which violated the plaintiffs' constitutional rights, and (2) whether the other defendant municipalities are liable for the conduct of its officers, pursuant to its policy of adhering to the police practices of Washington Township.[12]

As to the defendant officers, the plaintiffs bring this action against them in their individual and official capacities. The Supreme Court has made it clear that state officials sued in their individual capacities are "persons" for purposes of § 1983 liability. Hafer v. Melo, 112 S.Ct. 358, 360 (1991). The crux of the plaintiffs' civil rights claim in Count I is that the

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[9] See, Monack deposition at pp. 18-25.

[10] See, Deposition of Darhl Snyder at pp. 10-11.

[11] See, Monack deposition at pp. 26-27.

[12] We note that municipal liability may attach even if a municipality's policy is constitutional, Canton of Ohio, 489 U.S. at 386-87, and if its officer is not liable. Fagan v. City of Vineland, No. 92-5481, et al., slip op. at 16-19 (3d Cir. April 29, 1994). However, municipalitites are immune from punitive damages in section 1983 claims, City of Newport v. Fact Concepts, Inc., 453 U.S. 247 (1981), and so the plaintiffs' request for punitive damages as to the defendant municipalities should be stricken. Likewise, Mr. Livingstone's claim for loss of consortium in Count I should be stricken. Quitmeyer v. SEPTA, 740 F.Supp. 363 (E.D.Pa. 1990)

defendants used excessive and unreasonable force upon Mrs. Livingstone; that the entered the plaintiffs' premises without a warrant or legal authority and conducted an improper search and seizure; and that they engaged in malicious prosecution and abuse of process by bringing false charges against Mrs. Livingstone in an effort to secure a release from the plaintiffs, including their promise that no legal action would be taken against the defendants.

In Graham v. Connor, 109 S.Ct. 1865 (1989), the Supreme Court held that an excessive force claim arising out of an officer's arrest or investigatory stop of a free citizen is most properly analyzed under the Fourth Amendment's "objective reasonableness" standard. The Graham Court explained that the "reasonableness" inquiry is an objective one:

> the question is whether the officers' actions are 'objectively reasonable' in the light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. 109 S.Ct. at 1872.

Here, there is a genuine issue of material fact in dispute as to whether Officers Monack and Snyder used excessive and unreasonable force in effecting Mrs. Livingstone's arrest.[13]

Likewise, there is a material question of fact in dispute as to whether the actions of Monack and Snyder and those of Officer Moody violated the plaintiffs' Fourth Amendment privacy rights. While Mr. Livingstone consented to the officers entry into his residence for the purpose of discussing his dispute with his daughter[14], he neither consented to a full blown search of his home, nor consented to the officers re-entering his

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[13] See, Deposition of Frances Livingstone at pp. 55-73 and 104.

[14] See, transcript of criminal trial at p. 219.

residence after they walked outside with him.[15]

In addition, it is well recognized that an arrest without probable cause is a constitutional violation actionable under §1983. Radich v. Goode, 886 F.2d 1391, 1395 (3d Cir. 1989). Probable cause exists when the facts and circumstances are sufficient to lead a reasonable officer to believe that the suspect had committed an offense. Id. at 1395-1396. In incidents involving warrantless arrests, as here, the reasonableness of a police officers probable cause determination is generally a question for the trier of fact. Losch v. Borough of Parkesburg, Pa., 736 F.2d 903, 909 (3d Cir. 1984). Thus, the defendants' instant motions should be denied as to Count I.[16]

With respect to the assault and battery claim in Count II, only Officer Moody has moved for summary judgment. The record fails to show that Officer Moody had any involvement in the physical altercation with Mrs. Livingstone, and he did not assist Officers Monack and Snyder in carrying Mrs. Livingstone from her home. Likewise, no evidence indicates that he threatened or intimidated her. The crux of this claim as to Moody is that he failed to intervene in the alleged misconduct.

It is clear, however, that Moody cannot be held liable for failing to come to Mrs. Livingstone's aid while allegedly condoning the acts of Monack and Snyder. As the Third Circuit held in Brown v. Grabowski, 922 F.2d 1097, 1120 (3d Cir. 1990):

> [I]n the context of police action, an official's mere -- and even callous -- inaction in the face of subordinate officers' unconstitutional actions

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[15] Id. at pp. 220-221, 236 and 245-46.

[16] Although the police officials argue otherwise, we cannot say as a matter of law that they are entitled to qualified immunity, for based upon the evidence of record, a trier of fact could determine that their conduct violated clearly established law.

> clearly does not suffice to render the official liable for those actions.

Since the record fails to show that Officer Moody engaged in such tortious conduct, his instant motion should be granted as to Count II.

In Counts III and IV, the plaintiffs have asserted claims for malicious prosecution and malicious abuse of process. Malicious prosecution concerns the wrongful initiation of an action, whereas malicious abuse of process involves a perversion of a process after it has been issued. Cameron v. Graphic Management Associates, 817 F.Supp. 19, 21 (E.D.Pa. 1992), citing McGee v. Feege, 535 A.2d 1020 (Pa. 1987). Here, as set forth in paragraph 27(c) of the complaint, it would appear that the plaintiffs' allegations pertain only to a malicious prosecution claim, as they allege in pertinent part:

> Plaintiff Frances Livingstone was arrested without probable cause and for an improper purpose. More particularly, the purpose of the arrest and pursuit of the unsubstantiated charges was to divert attention from the outlined police wrong-doing, to exhaust or strain the plaintiff's financial and emotional resources, and to utilize improperly as leverage the false charges in an effort to secure a civil release and promise not to pursue legal action against the defendants...

Under Pennsylvania law, the elements of a malicious prosecution claim are that the defendants (1) instituted the proceedings (2) without probable cause (3) with actual malice and (4) that the proceedings terminated in favor of the plaintiff. Lippay v. Christos, 996 F.2d 1490, 1502 (3d Cir. 1993). Here, since Mrs. Livingstone's criminal proceedings did not terminate in her favor, but rather were dismissed pursuant to settlement discussions, this claim has no merit.

It is clear under Pennsylvania law that if charges in an

underlying action are dropped as a result of a compromise, the accused may not bring a subsequent action for malicious prosecution. Junod v. Bader, 458 A.2d 251, 253-54 (Pa. Super. 1983). As the Junod Court explained:

> [I]f the charges are dropped as a result of a compromise, our courts conclude that the accused placed a higher value on peace than on establishing his innocence, and thus will not allow him to burden the courts or another party with a second action in which the accused, no longer himself at risk, asserts the same claim of innocence that he earlier abandoned.

Id. at 253. Here, since a compromise was reached among the parties in Mrs. Livingstone's criminal proceedings (whereby she was acquitted on the criminal charges against her), the claim for malicious prosecution in Count III will not lie.

In addition, the plaintiffs' claim for malicious abuse of process in Count IV has no merit. "The essence of an abuse of process claim is that proceedings are used for a purpose not intended by the law" Cameron, supra, 817 F.Supp. at 21, citing, Rosen v. Tesoro Petroleum Corp., 582 A.2d 27, 32 (1990), appeal denied, 592 A.2d 1303 (Pa. 1991). Typical malicious abuse of process claims involve such situations as extortion by means of attachment, execution or garnishment, and blackmail through an arrest or criminal prosecution. Cameron, 817 F.Supp. at 21.

An abuse of process claim is not actionable, however, "if the claimant, even with bad intentions, merely carries out the process to its authorized conclusion." Id. Here, although there is a material question of fact in dispute as to whether the plaintiffs' assent to the settlement was voluntary and informed, the record does not indicate that the defendants engaged in a perversion of the process. Thus, the instant motions should be granted as to this claim.

Count V sets forth a claim for invasion of privacy. This

claim is time-barred since, under Pennsylvania law, a cause of action for invasion of privacy must be commence within one year. 42 Pa.C.S.A. §5523. We note that Pennsylvania's two-year statute of limitations for personal injury claims would be applied here if this claim was asserted under § 1983. See, Kost v. Kozakiewicz, 1 F.3d 176, 190 (3d Cir. 1993). However, as the plaintiffs' claim for invasion of privacy is brought as a supplemental claim, it is time-barred.

In Count VI, the plaintiffs assert a claim for intentional infliction of emotional distress. In order to prevail on this claim, the plaintiffs must prove that the defendants "by extreme and outrageous conduct, intentionally or recklessly caused [them] severe emotional distress." Hackney v. Woodring, 622 A.2d 286, 288 (Pa.Super. 1993), alloc. granted, 634 A.2d 224 (Pa. 1993). As the Hackney Court explained:

> Liability will be found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Id., citing Restatement (Second) of Torts, § 46 comment d.

Under current Pennsylvania law, competent medical evidence is required to support a claim for the alleged intentional infliction of emotional distress. Bougher v. University of Pittsburgh, 882 F.2d 74, 80 (3d Cir. 1989), citing Kazatsky v. King David Memorial Park, Inc., 527 A.2d 988, 995 (Pa. 1987); but see, Hackney v. Woodring, supra, 622 A.2d at 288-290 (where the Superior Court held that expert medical testimony is unnecessary where there is sufficient evidence of outrageous conduct and resulting emotional distress within the

understanding of the average juror).[17] Here, the plaintiffs have submitted a supplemental and/or amended pretrial statement with various expert medical reports appended thereto. They also have listed an extensive number of doctors and medical personnel in their list of witnesses. Thus, at this juncture, we cannot say that the plaintiffs have failed to present competent medical testimony to support their claim of emotional distress, and hence, Count VI should survive the instant motions.

The plaintiffs' claim for conversion in Count VII is brought against all of the defendants. The plaintiffs assert that the defendants came into custody of and damaged their personal property, including their house, house furnishings and clothing.

The defendants argue that they are immune from this claim based upon the Pennsylvania Political Subdivision Tort Claims Act ("the Act"), 42 Pa.C.S.A. § 8541 et seq., which grants immunity to local agencies and their employees for personal injury or property damage caused by their "negligent" acts.[18] While §8542 of the Act immunizes a municipality or its employees from "negligent acts", the Act provides that such negligent conduct "shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct." 42 Pa.C.S.A. § 8542 (a)(2). The Act also bars immunity for intentional torts. Cooper v. City of Chester, 810 F. Supp. 618, 625-26 (E.D.Pa. 1992), citing 42 Pa.C.S.A. § 8550.

Here, the plaintiffs have alleged that the defendants'

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[17] On October 14, 1993, an appeal from the Superior Court's decision in Hackney was granted by the Pennsylvania Supreme Court. At this juncture, no decision on the appeal has been rendered.

[18] The General Assembly has provided nine exceptions in which such sovereign immunity is waived, (see, 42 Pa.C.S.A. § 8522(b)), but none of these exceptions are applicable here.

conduct amounted to more than mere negligence. The complaint alleges that the defendants' acts "were performed knowingly, intentionally and/or maliciously, or alternatively in such reckless disregard of the plaintiff's rights as to amount to outrageous and/or willful misconduct."[19] Accordingly, the defendants are not entitled to immunity from the conversion claim in Count VII. See, Wade v. City of Pittsburgh, 765 F.2d 405, 411-12 (3d Cir. 1985); City of Chester, supra, 810 F.Supp. at 625-26.

Likewise, this claim should not be dismissed pursuant to 42 Pa.C.S.C. § 5522, which states in pertinent part;

> Within six months from the date that any injury was sustained or any cause of action accrued, any person who is about to commence any civil action or proceeding within this Commonwealth...against a government unit for damages on account of any injury to his person or property...shall file in the office of the government unit, and if the action is against a Commonwealth agency for damages, then also file in the office of the Attorney General, a statement in writing...

42 Pa.C.S.A. § 5522(a)(1). The statute also provides that:

> If the statement...is not filed, any civil action or proceeding commenced against the government unit more than six months after the date of injury shall be dismissed...The court shall excuse noncompliance with this requirement upon a showing of reasonable excuse for failure to file such statement...

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[19] See, complaint at ¶ 23.

42 Pa.C.S.A. §5522 (a)(2) (emphasis added).[20]

Although the plaintiffs did not provide such written notice within the above six-month period, the instant claim should not be dismissed. Under the statute's "reasonable excuse" provision (highlighted above), an action will not be dismissed absent a showing of prejudice to the defendant. In re Paoli Railroad Yard PCB Litigation, 916 F.2d 829, 864-65 (3d Cir. 1990); Hurt v. Philadelphia Housing Authority, 806 F.Supp. 515, 529 (E.D.Pa. 1992). Here, the defendants have neither shown nor claimed that they were prejudiced by the untimely notice, and thus, Count VII should not be dismissed.

Therefore, for the reasons set forth above, it is recommended that the supplemental motion to dismiss and/or for summary judgment brought by Washington Township and Officer Frank E. Monack, Jr. (Docket No. 47) and the motion for summary judgment submitted on behalf of North Belle Vernon Borough and Officer Darhl Snyder (Docket No. 51) be granted as to Counts III, IV and V and denied as to all other claims, and that the motion to dismiss and/or for summary judgment filed by Fayette City Borough and Officer Raymond Moody (Docket No. 56) be granted as to Counts II, III, IV and V and denied as to all other claims.

Within ten (10) days after being served with a copy, any party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven(7) days from the date or service of objections to responde thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

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[20] We note that the above notice provision does not apply to claims brought under § 1983. Knoll v. Springfield Township School Dist., 763 F.2d 584, 585 (3d Cir. 1985); Hurt v. Philadelphia Housing Authority, 806 F.Supp. 515, 529 (E.D.Pa. 1992).

Respectfully submitted,

(s)
Robert C. Mitchell, Chief
United States Magistrate Judge

Dated: June 8, 1994

PRINTER'S NOTE:

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Filed December 13, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-3288

FRANCES E. LIVINGSTONE and
JOSEPH A. LIVINGSTONE, her husband,

Appellants

v.

NORTH BELLE VERNON BOROUGH, FAYETTE CITY BOROUGH, WASHINGTON TOWNSHIP, FRANK E. MONACK, JR., individually and in his capacity as officer of WASHINGTON TOWNSHIP, OFFICER RAYMOND MOODY, individually and in his capacity as officer for FAYETTE CITY BOROUGH, and OFFICER DARHL SNYDER, individually and in his capacity as an officer for NORTH BELLE VERNON BOROUGH

Argued December 15, 1992

Before: SLOVITER, *Chief Judge*, GREENBERG, *Circuit Judge*, and POLLAK,* *District Judge*

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 91-0059)

Reargued In Banc May 11, 1993

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*Hon. Louis H. Pollak, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, *Circuit Judges*

(Filed: December 13, 1993)

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OPINION OF THE COURT

SLOVITER, *Chief Judge.*

This is the second time in recent months that the in banc court has considered whether a release-dismissal agreement provides an absolute defense to a plaintiff's civil rights suit alleging police misconduct and excessive use of force. In *Cain v. Darby Borough*, 7 F.3d 377 (3rd Cir. 1993), we held that the release-dismissal agreement relied on by the district court as the basis for its grant of summary judgment to the defendant municipalities and officials was unenforceable because the defendants had not made the requisite case-specific showing that the public interest was served by obtaining the release. In this case, we focus on another prong of the required inquiry into release-dismissal agreements, i.e. the need for defendants to show that there was a knowing and voluntary release-dismissal agreement. Because there are material issues of fact as to whether plaintiffs Frances and Joseph Livingstone validly waived their rights to sue the defendant police officers and municipalities for civil rights violations arising from a domestic dispute at the Livingstone home, we will vacate the district court's order granting summary judgment for the defendants and remand for further proceedings.

I.

FACTS AND PROCEDURAL HISTORY

This civil suit filed by Frances and Joseph Livingstone against the police officers and municipalities arose from the conduct of the police officers on the night of January 12-13, 1989, at the Livingstone home in Washington Township, Pennsylvania. During a family argument between Carrie Livingstone, age twenty-two, who was unmarried and living at her parents' home with her fourteen-month-old son, and Joseph, her father, Mr. Livingstone struck Carrie on the face, causing her lip to split and bleed. Carrie ran out of the house and to the community ambulance service

across the street, where an employee called the police. When Officer Frank Monack arrived, Carrie told him that her father had struck her and that her parents were holding her son without her consent.

Monack, who was at that time an officer in the Washington Township Police Department and is now Chief of Police, radioed for assistance pursuant to an inter-municipal police cooperation agreement. Raymond Moody, who was and is the Chief of Police for the Borough of Fayette City, and Darhl Snyder, an officer in the North Belle Vernon Police Department, responded. They proceeded to the Livingstone home where Mr. Livingstone permitted them to enter for the purpose, he later testified, of discussing possible criminal charges against him arising out of the incident. Following a brief discussion, Monack and Snyder accompanied Mr. Livingstone outside, and Monack told him to go to the nearby police station to make a statement.[1] No charges were filed against Mr. Livingstone that evening or at any later time.

Monack and Snyder then reentered the Livingstone household, this time in search of Carrie's son and admittedly without a warrant or court order.[2] Mrs. Livingstone had retreated to the back bedroom with her grandson, and had locked and barricaded the door. When she refused to open the door, Monack picked the lock and then tried to push the door open. From the partially opened door, Mrs. Livingstone hit him with a fishing rod and scratched him. Monack and Snyder broke the door down to enter the room, and then Monack told Mrs. Livingstone she was under arrest.

Mrs. Livingstone testified that both men struck her, causing her to lose consciousness and sustain bruises, lacerations, lost teeth, and head injuries. According to defendants, they used force only for the purpose of getting handcuffs on her after she struck the officer, and a stun gun to subdue her because she was screaming and kicking.

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1. The parties dispute whether Monack also told Mr. Livingstone he was under arrest.

2. There is some dispute as to Moody's whereabouts.

Snyder held her down while Monack used the gun. Mrs. Livingstone claims that Monack then said "you want a thrill, I'll give you a thrill" and applied the stun gun between her legs. A medical examination conducted at the hospital that night notes a burn in the vulval area.

The officers removed Mrs. Livingstone, handcuffed, from the house. She states that they dragged her outside and dropped her several times, banging her head, and then left her lying in cold muddy water for hours. The officers claim that her thrashing caused them all to fall, and that she refused to get up.

On January 13, 1989, the morning after the altercation, Mrs. Livingstone was charged by Monack, on behalf of the Washington Township Police Department, with disorderly conduct, aggravated assault, terroristic threats, resisting arrest, and interference with custody. At a preliminary hearing on April 18, 1989, Mrs. Livingstone was held over for a jury trial on all but the terroristic threats charge, and the aggravated assault charge was reduced to simple assault.

The trial in Fayette County Court of Common Pleas began on February 13, 1990, with attorney Thomas R. Ceraso representing Frances Livingstone and Jack R. Heneks, Jr., an Assistant District Attorney, representing the Commonwealth of Pennsylvania. Carrie Livingstone testified for the prosecution, followed by Monack, Snyder, Moody, Police Chief Robert Matthews of Washington Township, and Evelyn Rehe of the community ambulance service. The Commonwealth rested, and Mrs. Livingstone demurred to all of the charges. The demurrer was granted on the charge of interference with custody on the ground that there were no facts showing danger to the child, but was denied as to the other charges.

Thereafter, Joseph Livingstone and his son, James, testified for the defense. Before Mrs. Livingstone was to take the stand (and presumably would have testified about her claims with regard to police use of a stun gun on her private parts), the trial judge, Judge Cicchetti of the Court of Common Pleas, met with Heneks and Ceraso to discuss whether the matter could be resolved.[3] After settlement

3. Plaintiffs assert that the Commonwealth initiated settlement negotiations, but Heneks in his affidavit states that it was the trial judge

negotiations, a conference was held *in camera* with Judge Cicchetti. Present were Moody, Monack, Matthews (now deceased), the Livingstones, Ceraso, and Heneks.

Ceraso summarized the arrangement by stating that the defense would move for a judgment of acquittal after James Livingstone finished his testimony; that expenses for the physical damage to the Livingstone house and for Mrs. Livingstone's reasonable medical care would be paid; and that once those bills were paid, the Livingstones would release any civil claims. Ceraso stated on the record:

> there will be an agreement on the part of my client, Mrs. Livingston[e], and also her husband, Joe Livingston[e], who is present, that upon payment of reasonable medical bills that w[e]re associated with the incident that occurred, based on my forwarding those to Washington Township with confirmation, together with bills reflecting damage incurred at the household of Mr. and Mrs. Livingston[e], that Washington Township will cause the same to be paid. At the time of final payment of those bills, there will be a full and complete release signed with reference to any civil action on the part of Mr. and Mrs. Livingston[e]. It's also my understanding that at that time there will also be a release signed by Washington Township, or any of its proper officials, or any member of the police force necessary to release Mr. and Mrs. Livingston[e] from any liability ....

App. at 1109.

In response to the judge's inquiry, the parties voiced an expression of assent. The court asked whether "you all think this is in the best interest for everyone" and Matthews, Monack, and Heneks said they did. App. at 1112. When they returned to the courtroom, Ceraso moved for a judgment of acquittal on the criminal charges against Mrs. Livingstone, which the court granted.

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who instigated the settlement discussions. We do not find this a material dispute. The effect of the agreement "is not dependent upon which party first suggests the release ...." *Boyd v. Adams*, 513 F.2d 83, 88 (7th Cir. 1975).

It is undisputed that the settlement agreement was never reduced to writing. The Livingstones never submitted for payment any medical bills or household repair bills, and no payments have been made. The Board of Supervisors of Washington Township took no action to officially ratify the agreement until almost two years after the conference in chambers, and only then after this suit was started.[4] There is no evidence that the other two municipal defendants, North Belle Vernon Borough and Fayette City Borough, have ever taken any action to ratify any putative settlement.

On January 14, 1991, almost a year after the criminal trial, the Livingstones filed this action against the police officers and the three employer municipalities. The complaint consisted of seven claims: a federal claim filed pursuant to 42 U.S.C. § 1983 (1988), and state law claims alleging assault and battery, malicious prosecution, malicious abuse of process, invasion of privacy, intentional infliction of emotional distress, and conversion.

The defendants filed motions to dismiss or, in the alternative, for summary judgment. The district court referred the case to a magistrate judge, who ordered the parties to engage in discovery[5] and to submit briefs and materials in support of the motions.

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4. There was testimony that on the day of the settlement, two of the three members of Washington Township's Board of Supervisors were in the courthouse, were informed of the agreement, assented to it, and later telephoned the third supervisor, who also agreed. Washington Township has attached to its brief a document showing an official ratification by its Board of Supervisors in February 1992, after this suit was filed.

5. Ceraso declined to give a deposition on the ground of the attorney-client privilege asserted by Mrs. Livingstone. The magistrate judge, and thereafter the district court, denied defendants' joint motion to compel his testimony. Mrs. Livingstone also refused to answer any questions regarding her conversations with Ceraso about the release-dismissal agreement, and again the magistrate judge denied the motion of defendants to compel her to reveal this information.

Plaintiffs concede that they asserted the privilege for "tactical" reasons, to make it difficult for the defendants to show that Mrs. Livingstone acted on the advice of her counsel and suggest that they may now be

In their briefs in support of summary judgment, defendants argued that the suit was barred by the release-dismissal agreement reached during the *in camera* conference before Judge Cicchetti. The Livingstones claimed that they never intended to waive their rights to sue, pointing out that the agreement was never reduced to writing and that Washington Township never made the contemplated payments. They also contended that the agreement was never properly entered into by the municipalities, as the Washington Township Board of Supervisors never formally approved it and the other boroughs' governing bodies never considered it, and that the agreement was invalid and unenforceable under Pennsylvania law.

On April 8, 1992, the magistrate judge submitted a Report and Recommendation recommending that summary judgment be granted for the defendants on the basis of the release-dismissal agreement. Although the court acknowledged that Washington Township may not have formally approved the agreement, it noted that two supervisors, a quorum, had approved it, thereby satisfying Pennsylvania law. Without comment on the absence of the other municipalities and officers from the agreement, the magistrate judge concluded that plaintiffs had contracted with all of the defendants, and thus the plaintiffs' civil suit was barred; that the agreement comported with due process because the plaintiffs understood that they were waiving their rights to assert future civil claims and had entered into the release voluntarily; and that there was sufficient consideration because the plaintiffs, in exchange for the surrender of their potential civil claims, had secured the dismissal of the criminal charges and a promise by the defendants not to sue them.

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willing to waive the attorney-client privilege. Appellants' Brief at 28 n.2. Inasmuch as the privilege issues are not before us in this appeal, we do not take any position on whether a party who challenges a release may assert the attorney-client privilege to conceal the information which her opponent needs to meet that challenge. *See, e.g., Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *United States v. Bilzerian*, 926 F.2d 1285, 1291-94 (2d Cir.), *cert. denied*, 112 S. Ct. 63 (1991).

Objections were filed but the district court adopted the magistrate judge's opinion as its own and granted summary judgment for all defendants. This timely appeal followed.

We have jurisdiction under 28 U.S.C. § 1291 (1988). For a grant of summary judgment our review is plenary, and we review the record giving the benefit of all inferences to the non-moving party. *See Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1093 (3d Cir. 1988).

II.

DISCUSSION

A.

Applicable Law

The district court granted summary judgment for the defendants in reliance on the Supreme Court's decision in *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987), where the Court gave effect to a release-dismissal agreement. The plaintiff, Rumery, had been charged with the state-law felony of tampering with a witness, and agreed to release his potential civil rights claims against the town officials in return for the prosecutor's agreement to dismiss all criminal charges. When Rumery nonetheless sued the town officials ten months after the criminal charges were dropped, the defendants moved to dismiss on the ground that the suit was barred by the release-dismissal agreement. The district court dismissed the case, finding that Rumery's waiver was "voluntary, deliberate and informed." *Id.* at 391. The Court of Appeals for the First Circuit reversed, holding that release-dismissal agreements are *per se* invalid as against public policy because they tempt prosecutors to "trump up charges" in reaction to possible civil rights suits and to suppress evidence of police misconduct, and would leave constitutional violations unremedied. *See Rumery v. Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985), *rev'd*, 480 U.S. 386 (1987).

In a 5-4 decision, the Supreme Court reversed, holding that such agreements are not *per se* invalid. *See Rumery*, 480 U.S. at 392. The Court, looking to federal common law for the policies underlying the waiver of rights conferred by a federal statute,[6] adopted a case-by-case approach to determining whether a release-dismissal agreement should be enforced, balancing the interests in its enforcement against the public interests harmed. *See id.* Justice Powell wrote for the majority that although some defendants may feel coerced into giving up meritorious claims, the possibility of coercion by itself does not justify an outright ban on such agreements. *See id.* at 393-94. After satisfying itself that Rumery voluntarily waived his right to sue, that there was no evidence of prosecutorial misconduct, and that enforcement of the agreement would not adversely affect the public interest, the Court upheld the dismissal of Rumery's section 1983 complaint on the basis of the release. *See id.* at 398.

Justice O'Connor concurred in part and in the judgment, emphasizing that because of the great potential for prosecutorial misconduct and coercion, it is the burden of the public officials to "*prove*" that "a particular release executed in exchange for the dismissal of criminal charges was voluntarily made, not the product of prosecutorial overreaching, and in the public interest." *Id.* at 401 (O'Connor, J., concurring in part and concurring in the judgment). She noted that in assessing voluntariness,

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6. Whereas *Rumery* counsels that the validity of a release-dismissal for a section 1983 claim is governed exclusively by federal law, to be determined by reference to such "traditional common-law principles" as the Restatement of Contracts, 480 U.S. at 392 & n.2, the validity of any purported release of the state claims asserted in the Livingstones' complaint is governed by state law. In Pennsylvania, where the courts frequently follow the principles set forth in the Restatement, *see, e.g., Guy v. Liederbach*, 459 A.2d 744, 751 (Pa. 1983); *Penneys v. Pennsylvania R.R. Co.*, 183 A.2d 544, 546 (Pa. 1962), "[w]ritten releases are construed according to the rules governing the construction of contracts generally." *Sparler v. Fireman's Ins. Co.*, 521 A.2d 433, 434 (Pa. Super. Ct. 1987). It follows that the contract principles we apply to determine whether the parties entered into a binding release-dismissal agreement are substantially the same for all of the Livingstones' claims. At least the parties do not suggest otherwise.

courts should consider the knowledge and experience of the defendant, the severity of the criminal charges, whether a "legitimate criminal justice objective" supports the release, whether the defendant was represented by counsel, and whether the execution of the release was judicially supervised. *Id.* at 401-02.

Justice Stevens dissented, joined by Justices Brennan, Marshall, and Blackmun. He wrote that the waiver could never be deliberate and rational, that society is harmed because the agreements create conflicts of interest for prosecutors, and that the balance is unfair because presumptively innocent defendants give up valuable civil remedies and the goals of section 1983 are thwarted. *See id.* at 403-20 (Stevens, J., dissenting).

When this court considered the release-dismissal agreement in *Cain* in light of the decision in *Rumery*, the record showed that the Delaware County District Attorney's Office had a blanket policy of requiring a release from every criminal defendant who sought to be placed in the Accelerated Rehabilitative Disposition program. *See Cain*, 7 F.3d at 379. We held that such a blanket policy did not satisfy the public interest requirement which the majority in *Rumery* held was a condition of an enforceable release-dismissal agreement. *See id.* at 381. In light of that holding, we did not address the showing that would be necessary to satisfy *Rumery*'s requirement of voluntariness, an issue to which we now turn.

B.

Voluntariness

The inquiry into the voluntariness *vel non* with which a potential civil rights plaintiff waived her right to sue entails more than ascertaining whether there was any coercion. *See, e.g., Woods v. Rhodes*, 994 F.2d 494, 499 (8th Cir. 1993) (identifying as factors relevant to the "voluntariness" inquiry "whether the signer [of the release] is in custody at the time of signing"; "whether the signer was represented by counsel"; "the time with which the signer considered the document"; "whether the signer's attorney drafted the

document"; "whether the signer expressed any unwillingness"; and "whether the release is clear on its face"); *see also Berry v. Peterson*, 887 F.2d 635, 640 (5th Cir. 1989). We have used similar factors in determining the voluntariness of waiver in other contexts. *See Cirillo v. Arco Chem. Co.*, 862 F.2d 448, 451 (3d Cir. 1988) (ADEA claim). As we have previously noted, the factors relevant to make the determination of voluntariness vary in each case and depend "upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the waiving party." *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1095 (3d Cir. 1988) (quotations omitted).

The district court in this case correctly recognized that in order for the release-dismissal agreement to have met the standard of voluntariness established by the *Rumery* court, the Livingstones' assent must have been "voluntary, deliberate and informed." App. at 2585; *see Rumery*, 480 U.S. at 393 ("some release-dismissal agreements may not be the product of an informed and voluntary decision"); *see also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) (waiver of Title VII cause of action must be "voluntary and knowing"). The burden of proof is upon the party relying on the release. *See Rumery*, 480 U.S. at 399 (O'Connor, J., concurring); *id.* at 417 (Stevens, J., dissenting); *Coughlen v. Coots*, 5 F.3d 970, 973 (6th Cir. 1993); *Lynch v. City of Alhambra*, 880 F.2d 1122, 1128 (9th Cir. 1989). The district court concluded that there was no genuine issue of material fact that that standard was met in this case because "the evidence ... demonstrates that the mutual rights and obligations were explained to the parties, that they fully understood those rights and obligations, and that the Livingstones were at all times counseled by a highly skilled well regarded member of the bar." App. at 2585.

Unlike the district court, we conclude the record fails to demonstrate that the Livingstones were fully informed of the nature and scope of the agreement being proposed or even that there ever was a meeting of the minds. As described above, the alleged agreement was reached during a meeting in the chambers of the state judge before whom

Frances Livingstone was being tried on the criminal charges arising from the incident at her home. Present at the conference were police officers Monack, Monack's superior officer, Moody, the Livingstones, their attorney, and Assistant District Attorney Heneks.

In support of their position that an enforceable release-dismissal agreement was reached at that time, defendants produced the deposition testimony of Officer Monack who described the agreement as follows:

> I believe that we would pay the medical expenses their insurance didn't cover and for the damage to the residence, and we would also agree not to sue her and she would agree not to sue us. There would be no civil litigation.
>
> Q: And that the charges would be dismissed?
>
> A: Uh-huh.

App. at 1339. Similarly, Assistant District Attorney Heneks submitted an affidavit in which he stated:

> It is my strong belief that all persons including the Livingston[e]s, understood exactly what was happening. It was very clear after approximately an hour of negotiations that we were not going to proceed to a jury verdict and would allow the case to be dismissed. In return, the township was going to pay the medical bills of Mrs. Livingston[e] and damage to the house of the Livingston[e]s. The Livingston[e]s were agreeing not to sue the police officers and the police officers were agreeing not to sue the Livingston[e]s. Both Mrs. Livingston[e] and Mr. Livingston[e] indicated precisely to Judge Cicchetti that this arrangement was satisfactory to them. Both Livingston[e]s were fully in control of their faculties to the best of my knowledge and exhibited no outward signs of acute distress.

App. at 1116-17.

On the other hand, there is evidence that puts into question the level of the Livingstones' understanding of the implications and effect of the colloquy in chambers. Frances Livingstone was asked in deposition, "After the

meeting was over and you were headed back out to the courtroom, what was your understanding about what was supposed to occur?" She responded:

A: In the courtroom?

Q: Once you got back in there, what was your understanding as to what was to happen?

A: What was to happen in the courtroom you mean?

Q: Correct.

A: The judge would preside. They would dismiss Jamie [Livingstone] from cross-examination, and there would be a conclusion, and the charges were being dropped against me. And I wasn't allowed to testify because I was to take the stand that morning myself after my son.

Q: So it was dismissed?

A: Cross-examination.

App. at 727-28.

Her apparent confusion as to the terms of the arrangement was also displayed when she was asked whether the payment of medical bills was the subject of the conference in chambers, and she responded: "No. That had nothing to do with what we were going back in for." App. at 729. When she was questioned further on whether the medical bills were discussed in Judge Cicchetti's chambers, she answered:

A: You mean in the colloquy?

Q: Yes.

A: There was a mention of medical bills.

Q: What about them?

A: That I had medical bills that had to be paid.

Q: By whom?

A: I don't know. I mean, who would be responsible for them. I had to pay them. I was responsible — I mean my husband was responsible.

Q: Was there any discussion about whether you were to submit the bills to someone for payment?

A: The colloquy was very vague. We was to have a conference, I understood, and the judge would come into that room.

App. at 729-30.

Mrs. Livingstone was asked whether at any time during the meeting in Judge Cicchetti's chambers she heard the word "settlement" used, and she answered, "No." App. at 747. The questioning continued:

Q: You never heard that word?

A: "Settlement"?

Q: Did you ever hear that word "settle"?

A: I can't say that I have not or did. Judge [Cicchetti] said —

Q: Did Judge [Cicchetti] say anything about settlement?

A: Just have these matters settled and we can go home and sleep. Everyone can go home and sleep.

Q: What was your understanding of what he meant by that?

A: Well, they were dropping the charges.

App. at 747-48.

Of course, we do not suggest that a party's lack of understanding, even if genuine, of the terms of an agreement years after it was made necessarily undermines such an agreement. Ordinarily, the existence and terms of the agreement can be resolved by reference to a written document. While we do not hold that as a matter of law an oral agreement to waive the right to sue in exchange for the dismissal of criminal charges can never be valid, the absence of a written release-dismissal agreement requires even more scrupulous review by the courts than otherwise. No published opinion of any of the courts of appeals after *Rumery* has even considered, much less sustained, an oral release-dismissal agreement. Indeed, the *Rumery* Court

never mentioned the possibility of an oral release-dismissal agreement. Justice Stevens, at least, assumed that such agreements were written. *See Rumery*, 480 U.S. at 417 n.22 ("A court may enforce such an agreement only after a careful inquiry into the circumstances under which the plaintiff *signed the agreement* and into the legitimacy of the prosecutor's objective in entering into [it]." (emphasis added)) (Stevens, J., dissenting).

Written agreements maintain several advantages over their oral counterparts. At a minimum, written agreements allow the parties more opportunity for deliberate reflection. *See Woods v. Rhodes*, 994 F.2d 494, 497 (8th Cir. 1993) (signer had opportunity to review written release for two months); *Lynch v. City of Alhambra*, 880 F.2d 1122, 1124 (9th Cir. 1989) (signer reviewed release for four weeks). Written drafts also facilitate an atmosphere in which each party is able to propose modifications to the agreement. *See Woods*, 994 F.2d at 497 (parties negotiated after draft release presented); *Berry v. Peterson*, 887 F.2d 635, 638 (5th Cir. 1989) (draft release presented by County revised by signer's attorney). A written agreement may also provide evidence of the parties' respective bargaining power. *Compare Rumery*, 480 U.S. at 394 (citing drafting by plaintiff's attorney as evidence of voluntariness), *Lynch*, 880 F.2d at 1127 (same) *and Hammond v. Bales*, 843 F.2d 1320, 1322 (10th Cir. 1988) (same) *with Vallone v. Lee*, 7 F.3d 196, 198 (11th Cir. 1993) (district attorney's preparation of release agreement and charge to sign it "the way it is, or else" evidence of involuntariness) *and Hall v. Ochs*, 817 F.2d 920, 922 (1st Cir. 1987) (use of preprinted form).

In this case, of course, the existence of a transcript of the in chambers colloquy provides a basis to gauge whether the Livingstones had the opportunity to give the deliberate informed consent that is a condition of their valid waiver of their right to sue. The defendants insist that the voluntariness of the Livingstones' agreement to release them from all civil liability was insured by the presence of the trial judge during that colloquy. To be sure, a thorough inquiry by a judge will often establish that the participants are fully aware of the scope of the undertaking to which

their assent is sought. *See Government of Virgin Islands v. James*, 934 F.2d 468, 473 (3d Cir. 1991). In fact, the majority noted in *Rumery* that "it would be helpful to conclude release-dismissal agreements under judicial supervision." 480 U.S. at 398 n.10. Unfortunately, in this case notwithstanding the presence of a judge we still find patent ambiguity as to the existence of informed consent.

As shown by the transcript of the chambers conference, the judge introduced the issue of release-dismissal by the announcement that "we have been discussing the matter, and the attorneys have come up with a solution to this problem." App. at 1109. Ceraso then summarized his understanding, as set forth above, and he asked whether the parties understood. Monack responded affirmatively, but Mrs. Livingstone showed some lack of understanding of the arrangement, asking: "[e]xcuse me. Would that be Fayette City and all three, you know, that they could come back," apparently questioning whether the Livingstones would be subject to any further threat of criminal prosecution, or possibly civil litigation. It is not clear that Ceraso's answer was directly responsive:

> Well, in reality, no. The only liability that could be incurred, in my opinion, at this point, would be with regard to Washington Township, its police force, and its officers. However, since there were two other police departments involved in this, I have no objection if those police departments or those municipalities also wish to be included in the release, and we would then have reciprocal releases from them, and we would let that up to their individual counsel to make that decision, but we certainly would have no objection in doing that so it would be reciprocal on both sides.

App. at 1110. Ceraso continued,

> It would be my further understanding, your Honor, if this is acceptable, that the Commonwealth would conclude questioning of the present witness, that the defense would rest at that time, that I on behalf of my client, under the provisions of Rule 1124, would move for a judgment of acquittal. My reasons for movement for judgment of acquittal on the record, your Honor,

> would be that the case that the Commonwealth has presented has, in fact, included certain defenses which could be asserted, including the defense of self-defense, which has not been disproved by the Commonwealth, and on that basis it would be my motion that as a matter of law the defendant would be entitled to a judgment of acquittal at that point.

App. at 1110-11.

After Heneks signified his agreement, the judge then explained his view that no one could benefit by going forward with the case. The judge's comments in full were:

> The only reason I'm conducive to this kind of situation, and I discussed this with the attorneys, is I don't see anything that can benefit by going any further with the case. No matter which way it goes, if there's a guilty or a not guilty verdict, I don't see any way anybody can benefit. This way everyone can leave here and have this matter resolved, and maybe everyone can sleep a little better at night.
>
> There's no evidence that they were ever going to harm the child, and the police were trying to do their job. We all run these risks when we have these kinds of positions, and domestic cases are the worst possible cases to be involved in. We all know that, and it's hard to handle those things. You all get involved in these. We all make mistakes.

App. at 1111.

Judge Cicchetti asked Frances "But is *this* satisfactory to you Mrs. Livingston[e]?" App. at 1111 (emphasis added). She responded, "Yes, sir." App. at 1111. The judge then asked Joseph Livingstone, Monack, Matthews, and Moody whether they were satisfied, and all replied in the affirmative. Finally, there was an off-the record discussion about "money," which none of the affidavits elucidates.

The antecedent of the word "this" in Judge Cicchetti's question to Mrs. Livingstone is hardly manifest. The entire chambers conference took ten minutes.[7] There was no

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7. The court reporter's notes show that the conference began at 10:20 a.m. and concluded 10:30 a.m. App. at 1108, 1113.

explicit statement that the Livingstones were giving up their right to sue for physical injuries, damage to the household, and the alleged violations of their constitutional rights. Nobody explained to the Livingstones what was encompassed by the "full and complete release" to which Ceraso had referred and, significantly, no such release was presented to the Livingstones at that time or ever.

The contrast between the circumstances of this agreement and those before the Supreme Court in *Rumery* is pronounced. There, Justice Powell pointed out that a defendant's choice to enter into a release agreement may "reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action." 480 U.S. at 394. In holding that *Rumery's* circumstances "exemplifie[d]" such a "voluntary decision," Justice Powell pointed to the following: Rumery was a "sophisticated businessman"; "[h]e was not in jail and was represented by an experienced criminal lawyer, who drafted the agreement"; and "Rumery considered the agreement for three days before signing it." *Id.*

Given the different fact scenario with respect to the Livingstones, the lack of a clear on-the-record statement of the rights the Livingstones were being asked to waive, the abbreviated discussion in chambers, and the absence of any proposed written agreement which the Livingstones could read, much less take home to review, we conclude that the defendants have not met their burden to prove that the Livingstones gave informed and voluntary consent to a waiver of their right to bring an action under section 1983.

Because the defendants have failed to show that there are no genuine issues of material fact on the issue of the Livingstones' informed and voluntary consent to release their right to sue, we need not decide at this time many of the other issues as to which the parties have differed, such as whether the putative agreement was sufficiently definite to constitute a binding contract, the effect of the Livingstones' failure to forward to Washington Township Mrs. Livingstone's medical bills and the couple's bills for property damage, the failure of Washington Township to promptly ratify the agreement by formal resolution until

after this suit was brought, and the validity of any such agreement under Pennsylvania law.[8] The district court did not rule on these matters which, if relevant on remand, are for that court's consideration in the first instance.

Should the district court determine that there is a jury issue as to voluntariness,[9] the release cannot be upheld unless it also withstands the court's scrutiny as to whether there was prosecutorial overreaching and whether the release-dismissal agreement advanced the public interest. Although the court in *Berry* stated these issues are for the court rather than the jury, 887 F.2d at 637, there may be factual issues intertwined with the legal issues, such as whether the public interest reason proffered by the prosecutor is the actual reason that motivated the prosecutor to enter into the release-dismissal agreement. *Id.* at 637 n.2.

In our recent opinion in *Cain*, we explained that defendants must show that the prosecutor made the decision to enter into a release-dismissal agreement out of a case-specific concern for the public interest in preserving

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8. The Livingstones contend that the release-dismissal agreement is *ultra vires* because it obligates the township to indemnify an individual for an uncertain amount in violation of 53 Pa. Cons. Stat. Ann. § 65902 (Purdon 1982 & Supp. 1992) (specific appropriation must be budgeted for any contract requiring the expenditure of public funds from township coffers) and that the informal consent of the two Washington Township supervisors at the courthouse contravened the Pennsylvania Sunshine Act, 65 Pa. Cons. Stat. Ann. §§ 271-286 (Purdon Supp. 1992). Defendants respond, citing authority, that neither of these statutes is relevant here. As noted in the text, we express no opinion on these issues.

9. Although we do not preclude the district court from again granting summary judgment on remand should the record be free from material fact issues, we feel obliged to note our view that absent a retraction of the testimony of Mrs. Livingstone on this issue, it is unlikely that the court can determine that plaintiffs made a deliberate, informed and voluntary waiver without submission of that issue to a jury. *See Coolspring Stone Supply, Inc. v. American States Life Ins. Co.*, No. 93-3170, 1993 WL 482441, at *3, ___ F.3d ___ (3d Cir. Nov. 24, 1993) ("Summary judgment is inappropriate when a case will turn on credibility determinations and . . . on state of mind." (citations omitted)).

governmental resources rather than out of concern for the private interests of government officials. 7 F.3d at 381. Examples of valid prosecutorial interests accepted by the courts are the desire to protect a witness from the trauma of testifying discussed in *Rumery*, 480 U.S. at 398, and the move of the principal prosecution's witness away from the area of trial in *Woods*, 994 F.2d at 500. In applying that consideration here, the district court will have to take into account that the agreement was struck, if at all, towards the conclusion of Mrs. Livingstone's defense, that the cost of the prosecution had already been incurred, and that whatever opportunity existed for further rupture within the Livingstone family had been accomplished by the testimony of all family members save Mrs. Livingstone. We make these comments merely to emphasize for the district court's benefit that a general belief by prosecutors that release-dismissal agreements serve valid purposes is not sufficient to satisfy the public interest prong of the *Rumery* test.

The release is only one of the defenses asserted by the defendants.[10] If it is not dispositive pre-trial, the court will, of course, proceed to the remaining issues.

III.

Conclusion

For the reasons set forth above, we will reverse the entry

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10. The defendants raise several issues going to the viability of the Livingstones' claims. For example, North Belle Vernon and Snyder contend that plaintiffs' claim for invasion of privacy is barred by the one-year statute of limitations; that Mr. Livingstone's claim for loss of consortium is not recognized under section 1983; and that the complaint fails in part to state a claim upon which relief may be granted. Defendants also argue that plaintiffs' punitive damages claim is not recognized under section 1983 and that the conversion claim is barred under Pennsylvania law. We do not consider arguments unrelated to the validity and scope of the release-dismissal agreement because the Magistrate Judge and the district judge reached their conclusions solely on the basis of that agreement.

of summary judgment and remand for further proceedings in accordance with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANCES E. LIVINGSTONE and JOSEPH A. LIVINGSTONE, her husband, Plaintiffs,	)	
v.	)	Civil Action 91-59
NORTH BELLE VERNON BOROUGH, et al., Defendants.	)	

ORDER

AND NOW, this 24th day of April, 1992, after the plaintiffs, Frances E. Livingstone and Joseph A. Livingstone, her husband, filed an action in the above-captioned case, and after a motion to dismiss and/or for summary judgment was submitted on behalf of North Belle Vernon Borough and Officer Darhl Snyder (Docket No. 9), a motion to dismiss and/or for summary judgment was submitted on behalf of Officer Frank E. Monack (Docket No. 11), a motion to dismiss and/or motion for summary judgment was submitted on behalf of Washington Township (Docket No. 12) and a motion to dismiss and/or motion for summary judgment was submitted on behalf of Fayette City Borough and Officer Raymond Moody (Docket No. 13), and after a Report and Recommendation was filed by the United States Magistrate Judge which treated the motions as motions for summary judgment, and the parties were granted then days in which to file objections thereto, and upon consideration of the objections and brief in support of the objections file by the plaintiffs, and upon de novo review of the pleadings, and the Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that the motion to dismiss and/or for summary judgment submitted on behalf of North Belle Vernon Borough and Officer Darhl Snyder (Docket No. 9), the motion

to dismiss and/or for summary judgment submitted on behalf of Officer Frank E. Monack (Docket No. 11), the motion to dismiss and/or motion for summary judgment submitted on behalf of Washington Township (Docket No. 12) and the motion to dismiss and/or motion for summary judgment submitted on behalf of behalf of Fayette City Borough and Officer Raymond Moody (Docket No. 13), treated as motions for summary judgment, are granted.

_____

United States District Judge

cc: (next page)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

FRANCES E. LIVINGSTONE and JOSEPH A. LIVINGSTONE, her husband, Plaintiffs,	)	
v.	)	Civil Action 91-59
NORTH BELLE VERNON BOROUGH, FAYETTE CITY BOROUGH, WASHINGTON TOWNSHIP, FRANK E. MONACK, JR., individually and in his capacity as Officer for WASHINGTON TOWNSHIP, RAYMOND MOODY, individually and in his capacity as Officer for FAYETTE CITY BOROUGH and DARHL SNYDER, individually and in his capacity as an Officer for NORTH BELLE VERNON BOROUGH, Defendants.	)	

Report and Recommendation

Recommendation:

It is respectfully recommended that the motion to dismiss and/or for summary judgment submitted on behalf of North Belle Vernon Borough and Officer Darhl Snyder (Docket No. 9), the motion to dismiss and/or for summary judgment submitted on behalf of Officer Frank E. Monack (Docket No. 11), the motion to dismiss and/or for summary judgment submitted on behalf of Washington Township (Docket No. 12) and the motion to dismiss and/or for summary judgment submitted on behalf of Fayette City Borough and Officer Raymond Moody (Docket No. 13), treated as motions for summary judgment, be granted.

Report:

Presently before the Court for disposition are a motion to dismiss and/or for summary judgment submitted on behalf of North Belle Vernon Borough and Officer Darhl Snyder (Docket No. 9); a motion to dismiss and/or for summary judgment submitted on behalf of Officer Frank E. Monack (Docket No. 11), a motion to dismiss and/or for summary judgment submitted on behalf of Washington Township (Docket No. 12) and a motion to dismiss and/or for summary judgment or in the alternative to strike, submitted on behalf of Fayette City Borough and Officer Raymond Moody (Docket No. 13). Thus, all defendants have moved to dismiss or in the alternative for summary judgment.

At the time of the events in question, the plaintiffs' twenty-one year old daughter, Carrie Livingstone and her infant son were residing with the plaintiffs in their home in Belle Vernon, Pennsylvania. During the late evening hours of January 12, 1989, a domestic disturbance erupted at the plaintiffs' residence between the plaintiffs and their daughter during which Joseph Livingstone struck his daughter causing her to sustain facial injuries. Carrie then informed her parents that she intended to take her son, Nicholas, and leave the plaintiffs' home. When the plaintiffs refused to permit her to take her son, Carrie exited the residence and proceeded to the community ambulance service station across from the house where Officer Monack of the Washington Township police department was summoned and was informed of the events.

When Carrie made arrangements to stay at the home of a friend, Officer Monack summoned assistance to aid him in securing the child. In response to Monack's request, Officer Snyder of North Belle Vernon and Chief Moody of Fayette City arrived.[1] Officer Monack, Snyder and Moody then proceeded to the Livingstone residence to remove Nicholas.

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[1] See: Joint Appendix, Exhibit A, "Intermunicipal Police Cooperation Agreement".

At the Livingstone residence, Mr. Livingstone invited the officers in, and agreed to accompany them to the police station to make a statement. When the officers returned to remove the child, Mrs. Livingstone locked herself in a back bedroom with the child and refused to surrender him to his mother and the officers. Thereupon, Officer Monack opened the door and was struck by Mrs. Livingstone. Officers Monack and Snyder then proceeded into the bedroom and arrested Mrs. Livingstone. During the course of the arrest, force was employed to restrain Mrs. Livingstone. It is the degree of force employed which constitutes the basis for this suit.

Mrs. Livingstone was charged with disorderly conduct, aggravated assault, terroristic threats, resisting arrest and interfering with custody by Officer Monack. After a probable cause hearing the matter was referred to the Court of Common Please where it came on for trial. On the third day of trial the court entered an Order dismissing the case as a result of the "matter having been settled". The nature and scope of that "settlement'" are also contested here, and form one of the bases for the instant motions.

Issues before the Court.

The defendants have now all moved to dismiss or in the alternative for summary judgment. Rule 12(b)(6), F.R.Civ.P. provides that where on a motion to dismiss, matters outside the complaint are considered, the motion should be treated as one for summary judgment. Summary judgment is appropriate where there are no material factual issues in dispute and the movant is entitled to judgment as a matter of law. Gray v. York, F.2d (3d Cir 1992). In the instant case, since the parties have submitted extensive relevant documentation in support of their respective position, the pending motions will be treated as motions for summary judgment.

The "Settlement" Agreement.

The defendants now argue that the instant action is barred as a matter of law, as a result of a settlement agreement

entered into between the parties.

During the course of the criminal proceedings against Mrs. Livingstone, an in camera conference was held. Present at that conference with the Court, were Jack R. Heneks, Jr., Esq. and Assistant District Attorney, Thomas R. Ceraso, Esq., counsel for Mrs. Livingstone, Frances E. Livingstone, Joseph Livingstone, Frank Monack, Jr., Raymond Moody, and Robert F. Matthews.[2] At that time Mr. Ceraso explained the agreement:

> there will be an agreement on the part of my client, Mrs. Livingstone, and also her husband, Joe Livingstone, who is present, that upon payment of reasonable medical bills that were associated with the incident that occurred, based on my forwarding those to Washington Township with confirmation, together with bills reflecting damage incurred at the household of Mr. and Mrs. Livingstone, that Washington Township will cause the same to be paid. At the time of final payment of those bills, there will be a full and complete release signed with reference to any civil action on the part of Mr. and Mrs. Livingstone. It's also my understanding that at that time there will also be a release signed by Washington Township, or any of its proper officials, or any member of the police force necessary to release Mr. and Mrs. Livingstone from any liability...since there were two other police departments involved in this, I have no objection if those police departments or those municipalities also wish to be included in the release, and we would then have reciprocal releases from them, and we would let that up to their individual counsel to make that decision, but we certainly would have no objection in

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[2] See: Joint Appendix, Exhibit G at p. 274.

> doing that so it would be reciprocal on both sides.[3]

As a further part of this agreement, the Commonwealth was to conclude its questioning of the witness who was testifying, and the defense would then move for a judgment of acquittal. The Court then stated:

> The only reason I'm conducive to this kind of situation, and I discussed this with the attorneys, is I don't see anything that can benefit by going any further with the case. No matter which way it goes, if there's a guilty or a not guilty verdict, I don't see any way anybody can benefit. This way everyone can leave here and have this matter resolved, and maybe everyone can sleep a little better at night.[4]

When asked is this agreement was satisfactory to her, Mrs. Livingstone responded affirmatively,[5] as did Mr. Livingstone.[6]

Jack R. Heneks, Jr., Esq. who was charged with the prosecution of the criminal action, submitted an affidavit in which he stated:

> the initial arrangement agreed to by myself and the officers was to not proceed with the charges in exchange for a release of civil liability and a promise by the Livingstones not to initiate a civil action...

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[3] Id. at pp. 275-276.

[4] Id. at 277.

[5] Id at p. 277

[6] Id. at p. 278.

> Based on that promise to pay once the bills were submitted for payment by the Livingstones to Washington Township, Mr. Ceraso [counsel for Mrs. Livingstone] went back to the Livingstones, discussed the matter, came to me and indicated agreement...
>
> It is my strong belief that all persons including the Livingstones, understood exactly what was happening. It was very clear after approximately an hour of negotiations that we were not going to proceed to a jury verdict and would allow the case to be dismissed. In return, the township was going to pay the medical bills of Mrs. Livingstone and damage to the house of the Livingstones. The Livingstones were agreeing not to sue the police officers and the police officers were agreeing not to sue the Livingstones. Both Mrs. Livingstone and Mr. Livingstone indicated precisely to Judge Cicchetti that this arrangement was satisfactory to them. Both Livingstones were fully in control of their faculties to the best of my knowledge and exhibited no outward signs of acute distress...
>
> The Commonwealth did not have to use any further resources to prosecute, Mrs. Livingstone would not have to face criminal liability, the officers and township would not face civil liability, the Livingstones would have their bills paid and the family would not have to go through any further testimony which could have undermined the restored family relationship.[7]

The Livingstones maintain that there was never an agreement not to pursue civil relief. As support for this argument, the

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[7] See: Joint Appendix, Exhibits H and J.

plaintiffs contend that the agreement was never reduced to writing, was never signed by the parties, no monies were ever paid, nor was the agreement ever properly entered into by the municipal authorities. Thus, the plaintiffs now argue that because the agreement was never formally adopted by the township supervisors, it is not a proper agreement

Discussion.

In a case which is factually very similar to the instant one, Newton v. Rumery, 480 U.S. 386 (1987), the question presented was "whether a court properly may enforce an agreement in which a criminal defendant releases his right to file and action under 42 U.S.C. §1983 in return for a prosecutor's dismissal of pending criminal charges." In that case, the Court held that where the agreement is voluntary, deliberate and informed, it was a valid agreement. While unlike the present case, the agreement in Rumery had been reduced to writing, there is more than an adequate record here outlining the responsibilities and understanding of the parties.

In exchange for the dismissal of the criminal charges which the prosecutor believed might very well have led to a conviction[8], the Livingstones agreed to waive any rights to seek civil relief. Simultaneously, the police officers waived their rights to seek relief from the Livingstones. Thus, more than a quid pro quo for the mutual benefit of all concerned existed. The only question here, is whether or not the waiver by the Livingstones was voluntary, deliberate and informed.

The uncontradicted evidence submitted in support of the instant motions, demonstrates that the mutual rights and obligations were explained to the parties, that they fully understood those rights and obligations, and that the Livingstones were at all times counseled by a highly skilled well regarded member of the bar. Thus, as the Court further observed in Rumery,

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[8] See: Joint Appendix, Exhibit H.

> In many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action...480 U.S. at 394.

While there may or may not have been formal ratification by the governmental authorities, there is evidence in the record to support the conclusion that at least two supervisors had approved the agreement.[9] Thus, the plaintiffs have secured a dismissal of the criminal charges[10], and an agreement by the police not to sue them for injuries sustained, and as a result they too should be required to honor their voluntary portion of the agreement.

Conclusion.

The unfortunate events in this matter arose from a domestic dispute in which the plaintiff, Mrs. Livingstone, attempted to prevent the police from restoring her grandson to his mother. While the events which unfolded thereafter are regrettable, nevertheless, it would appear that she was properly charged with various criminal offenses; that there was a substantial likelihood of her conviction, and that in consultation with her husband and attorney, a voluntary decision was made to waive their rights to seek civil relief in exchange for the dismissal of the criminal charges and an agreement by the police not to seek civil remedies from the plaintiffs. Thus, this uncontradicted scenario created a valid, enforceable agreement between the various parties, and it would now appear that the parties must be compelled to comply with their agreement.

Accordingly, because there are no material factual issues in dispute, and because it appears as a matter of law that the

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[9] See: Joint Appendix, Exhibit H at p. 3.

[10] See: Joint Appendix, Exhibit I.

plaintiffs are not entitled to relief, it is recommended that the various motions to dismiss, or in the alternative motions for summary judgment, treated as motions for summary judgment, be granted.

Respectfully submitted,
(s)
Robert C. Mitchell
United State Magistrate Judge

Dated: April 8, 1992

IN THE COURT OF COMMON PLEAS
OF FAYETTE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

vs. : NO. 323 of 1989

FRANCES E. LIVINGSTONE :

TRIAL PROCEEDINGS

Before Honorable Richard D. Cicchetti, President Judge, and a Jury, Tuesday morning, February 13, 1990, at 11:00 o'clock A.M., in Courtroom Number 1, Courthouse, Uniontown, Fayette County, Pennsylvania.

APPEARANCES

FOR THE COMMONWEALTH:
JACK R. HENEKS, JR., ESQ.
Assistant District Attorney
61 E. Main Street
Uniontown, PA 15401

FOR THE DEFENDANT:
THOMAS E. CERASO, ESQ.
126 North Maple Avenue
Greensburg, PA 15601

MARGARET L. ROHLF, CSR
Official Stenographer

(Thursday morning, February 15, 1990, at 10:20 A.M. an in camera colloquy takes place in the Judge's conference room, as follows):

APPEARANCES

JACK R. HENEKS, JR., ESQ.
Assistant District Attorney
For the Commonwealth

THOMAS R. CERASO, ESQ.
Counsel for Defendant

FRANCES E. LIVINGSTONE,
Defendant

JOSEPH LIVINGSTONE,
Husband of Defendant

FRANK MONACK, JR.
Washington Twp. Police Dept.
Prosecutor

CHIEF RAYMOND MOODY
Fayette City Police Dept.

CHIEF ROBERT F. MATTHEWS
Washington Twp. Police Dept.

MARGARET L. ROHLF, CSR
Official Stenogragher

***

THE COURT: We have been discussing the matter, and the attorneys have come up with a solution to this problem, so maybe we'll let Mr. Ceraso put it on.

MR. CERASO: It's my understanding, your Honor, that what we will do from a procedural standpoint is that at this in camera proceeding, which will be sealed and not subject to public knowledge, that there will be an agreement on the part of my client, Mrs. Livingstone, and also her husband, Joe Livingstone, who is present, that upon payment of reasonable medical bills that were associated with the incident that occurred, based on my forwarding those to Washington Township with confirmation, together with bills reflecting damage incurred at the household of Mr. and Mrs. Livingstone, that Washington Township will cause the same to be paid. At the time of final payment of those bills, there will be a full and complete release signed with reference to any civil action on the part of Mr. and Mrs. Livingstone. It's also my understanding that at that time there will also be a release signed by Washington Township, or any of its proper officials, or any member of the police force necessary to release Mr. and Mrs. Livingstone from any liability.

Do you understand?

MR. MONACK: Yes.

MRS. LIVINGSTONE: Excuse me. Would that be Fayette City and all three, you know, that they could come back--

MR. CERASO: Well, in reality, no. The only liability that could be incurred, in my opinion, at this point, would be with regard to Washington Township, its police force, and its officers. However, since there were two other police departments involved in this, I have no objection if those policed departments or those municipalities also wish to be included in the release, and we would then have reciprocal

releases from the, and we would let that up to their individual counsel to make that decision, but we certainly would have no objection in doing that so it would be reciprocal on both sides.

It would be my further understanding, your Honor, if this is acceptable, that the Commonwealth would conclude questioning of the present witness, that the defense would rest at that time, that I on behalf of my client, under the provisions of Rule 1124, would move for a judgment of acquittal. My reasons for movement for judgment of acquittal on the record, your Honor, would be that the case that the Commonwealth has presented has, in fact, included certain defenses which could be asserted, including the defense of self-defense, which has not been disproved by the Commonwealth, and on that basis it would be my motion that as a matter of law the defendant would be entitled to a judgment of acquittal at that point.

THE COURT: Mr. Heneks.

MR. HENEKS: Your Honor, that is my understanding of the agreement that has been reached between the Washington Township Police Department and the Washington Township authorities that are present.

THE COURT: The only reason I'm conducive to this kind of situation, and I discussed this with the attorneys, is I don't see anything that can benefit by going any further with the case. No matter which way it goes, if there's a guilty or a not guilty verdict, I don't see any way anybody can benefit. This way everyone can leave here and have this matter resolved, and maybe everyone can sleep a little better at night.

There's no evidence that they were ever going to harm the child, and the police were trying to do their job. We all run these risks when we have these kinds of positions, and domestic cases are the worst possible cases to be involved in. We all know that, and it's hard to handle those things. You all ge involved in these. We all make mistakes.

But is this satisfactory to you, Mrs. Livingstone?

MRS. LIVINGSTONE: Yes, sir.

THE COURT: And you, also, Mr. Livingstone?

MR. LIVINGSTONE: Yes, sir.

THE COURT: And is it satisfactory with you, Frank?

MR. MONACK: Yes, sir.

THE COURT: And you, Chief?

MR. MATTHEWS: Yes, sir.

THE COURT: And Mr. Moody?

MR. MOODY: Yes, sir.

THE COURT: Do you all think this is in the best interest for everyone?

MR. MATTHEWS: Yes, sir.

MR. MONACK: Yes, very much so.

MR. HENEKS: And I do, as well, on behalf of the Commonwealth, and I understand the Courts' position in regard to this and the evidence, and I believe the Commonwealth would be well-served by this adjudication, as well.

MR. CERASO: The only other thing I would say, your Honor, you know, this is in camera and I would like to state for the record that we will make no comments to the press with regard to what has occurred. I see no necessity for that to be made a matter of public record. The case is concluded as a normal case, and that's the end of it.

MR. HENEKS: And I would agree with that statement and I would direct our office, and I believe they will be in agreement with that as well, and they will not make any comments to the press, as well.

THE COURT: What I'm -- the motion's going to be made. I'm going to sustain the motion on the basis that the evidence isn't sufficient to disprove the defense raised. That's what I'm going to base it on.

MR. CERASO: Very good.

THE COURT: I'm not going to make any other--

MR. HENEKS: I don't want to discuss how much money right now -- I'd like to go off the record.

(An off-the-record discussion followed, after which the parties returned to the courtroom).

(Conclusion of in camera colloquy 10:30 A.M.)

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :

ss

COUNTY OF FAYETTE :

I, JACK R. HENEKS, JR., was the First Administrative Assistant District Attorney during the February, 1990 session of Criminal Court in the Court of Common Please of Fayette County, Pennsylvania. I was assigned the case of Commonwealth vs. Frances E. Livingstone to prosecute. Defendant was charged with simple assault, disorderly conduct, resisting arrest and interference with the custody of children. The Commonwealth presented its case on February 13 and February 14, 1990. Following the Commonwealth's case, the defendant placed Joseph Livingstone, the Defendant's husband and James Livingstone, the Defendant's son on the stand. I was in the process of cross-examining him when Judge Cicchetti called for a recess for the day.

Prior to resuming cross-examination on February 15, 1991 both Mr. Ceraso, the Defendant's Counsel and I were called to Judge Cicchetti's chambers. Upon the inquiry of Judge Cicchetti regarding possible resolution of the matter before proceeding further, Mr. Ceraso and I began discussions as to the resolution of the criminal charge as well as the civil liability of the police officers and political subdivisions. I believed that the evidence was sufficient to warrant a conviction on the charges and that the testimony of the defense witnesses was going to be somewhat contradictory and/or inconsistent with each other and prior statements. Further, continued cross-examination of Mr. Livingstone and the anticipated cross-examination of the Defendant would have created a further rift in the family as Carrie had been reunited with her parents. Direct examination and cross-examination of Mrs. Livingstone would have shown great contrast with the testimony of Carrie, leading possibly to an undoing of that relationship.

The police officers, at first, were unwilling to drop the prosecution. Though I believed we had a sufficient case for

conviction, it was such an emotional case and the testimony of the Defendant and her witnesses would have made it more so that there was, and there always is some doubt about the ultimate outcome. The allegations by Mrs. Livingstone had disturbed the officers and they had always been concerned about the civil liability of charges were dropped.

Therefore, the initial arrangement agreed to by myself and the officers was to not proceed with the charges in exchange for a release of civil liability and a promise by the Livingstones not to initiate a civil action. I was present nearby when Mr. Ceraso was discussing this proposal with the Livingstones. As I recall some of the discussions took place in the front left side of Courtroom No. 1. I was going back and forth from the officers who were located in an anteroom in the hallway leading to Courtroom No. 1. Our initial proposal was rejected by Mr. Ceraso after discussions with his client and her husband. He asked for payment of the medical bills which I believe was somewhat between $3,000.00 and $5,000.00 and the damages to the property, such as the broken door. I realized that this would be something that the Washington Township Supervisors may need to take a look at. By coincidence, Steve Baker, a Washington Township Supervisor, happened to be in the Courthouse and officers and I had a discussion with him. He indicated approval and checked with one of the other supervisors, a Selma Russell, who was employed in the courthouse who also agreed.

Based on that promise to pay once the bills were submitted for payment by the Livingstones to Washington Township, Mr. Ceraso went back to the Livingstones, discussed the matter, came to me and indicated agreement.

The officers, Mr. Ceraso, the Defendant, Mr. Livingstone, Judge Cicchetti and Margaret Rohlf, the court reporter, entered the old grand jury room located adjacent to Courtroom No. 1. The room contained a long table around which the above persons sat. As indicated by the colloquy, that matter was specifically set on the record.

It is my strong belief that all persons including the Livingstones, understood exactly what was happening. It was very clear after approximately an hour of negotiations that we were not going to proceed to a jury verdict and would allow the case to be dismissed. In return, the township was going to pay the medical bills of Mrs. Livingstone and damage to the house of the Livingstones. The Livingstones were agreeing not to sue the police officers and the police officers were agreeing not to sue the Livingstones. Both Mrs. Livingstone and Mr. Livingstone indicated precisely to Judge Cicchetti that this arrangement was satisfactory to them. Both Livingstones were fully in control of their faculties to the best of my knowledge and exhibited no outward signs of acute distress.

At the end of our discussion, we went back to open court where I indicated I had no more questions for Mrs. Livingstone. Mr. Ceraso made the motion for acquittal based on Rule 1124 and I stood mute in the face of the motion. Judge Cicchetti granted the motion and, at that point, except for the submission and payment of the bills, I believed that the whole incident was at an end and properly concluded with both sides gaining benefit from the decision. The Commonwealth did not have to use any further resources to prosecute, Mrs. Livingstone would not have to fact criminal liability, the officers and township would not face civil liability, the Livingstones would have their bills paid and the family would not have to go through any further testimony which could have undermined the restored family relationship.

(s)_____
Jack R. Heneks, Jr., Esquire

Sworn to and subscribed
by me this 27th day of
November, 1991
(s)_____
Notary Public

(SEAL)

Supreme Court, U.S.
FILED

96 690 FEB 3 1997

OFFICE OF THE CLERK

No. 96-960

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

NORTH BELLE VERNON BOROUGH; FAYETTE CITY BOROUGH; WASHINGTON TOWNSHIP; FRANK E. MONACK, JR., individually and in his capacity as officer of WASHINGTON TOWNSHIP; OFFICER RAYMOND MOODY, individually and in his capacity as officer for FAYETTE CITY BOROUGH; OFFICER DARHL SNYDER, individually and in his capacity as an officer for NORTH BELLE VERNON BOROUGH,
Petitioners,

v.

FRANCES E. LIVINGSTONE, and JOSEPH A. LIVINGSTONE, her husband,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Peter M. Suwak, Esquire
Counsel of Record for Respondents

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Counsel for Respondents

21 pp

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether the Third Circuit Court of Appeals holding below, that, after the other public interest reasons offered by the Defendant and the lower court have been rejected or given little weight, an alleged release-dismissal agreement will not be given validity unless it is shown that the prosecutor who had entered into such an agreement had determined that the civil rights claims being waived were marginal or frivolous, was consistent with this Court's decision in Town of Rumery, ?

II. Whether the Court of Appeals holding below, that the party seeking to enforce an oral release/dismissal agreement in a civil action must discharge its burden of proof by clear and convincing evidence, was consistent with this Court's precedent?

(Respondents specifically reject Question II posed by the Petitioners in their Petition for Writ of Certiorari on the grounds that this question is not properly presented to this Court on this record. It is noted that Petitioners do not provide more than a perfunctory argument regarding this question in their Petition. Respondents would argue that the above questions better set forth the questions for review than those posed by Questions I and III in the Petition.)

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COUNTERSTATEMENT OF THE CASE

The first issue raised by Petitioners in this case was decided upon review of the summary judgment in favor of Petitioners at the district court level. The second issue sets forth a standard of proof based upon the oral nature of the release-dismissal agreement under review. The Petitioner's Statement of the Case, however, has been set forth with many inferences in their favor with the omission of much evidence favorable to the Respondents upon which genuine issues of material fact can be found. Therefore, Respondents present the following Counterstatment of the Case:

On or about January 12, 1989, a domestic dispute occurred at the Livingstone's residence at 1397 Fayette Ave. in Belle Vernon, PA. At the residence, the household included the Livingstone's daughter, Carrie Rose (date of birth: 11/15/66) and Carrie's son, the Livingstone's grandson, Nicholas (date of birth: 12-29-87).

As a result of the domestic dispute, Carrie Rose Livingstone left the house with extreme agitation. Shortly thereafter, defendant Officer Monack, defendant Officer Moody and defendant Officer Snyder appeared at the Livingstone residence. They indicated that they were arresting Joseph Livingstone as a result of the domestic altercation involving his daughter. (429a, 430a) Mr Livingstone voluntarily left with the policeman to go to the Washington Township Police Department. However, it is noted that ultimately no charges were filed against Mr. Livingstone.

Subsequently, however, the aforementioned defendant police officers returned to the Livingstone residence. The following events occurred at approximately 11:00 p.m. the night of January 12, 1989 and continuing past midnight into the early morning house of January 13, 1989.

Defendant officer Monack indicated that the police had

come to remove Nicholas, the Livingstone's grandson, from the premises. It is noted that Nicholas, approximately 14 months at the time, had lived his entire life at the Livingstone residence. The child's mother, Livingstone's daughter. Carrie, was unmarried, dependent upon the Livingstones in part for support, and had established the grandparents as custodians of the child in her absence.

The police had no arrest warrant, no search warrant, no custody order, or any other color of authority whatsoever to seize the child. It is noted that after she returned with the police, daughter Carrie did not make any direct requests to the Livingstones at that time for the child. (417a-421a, 423a). Nonetheless, defendant police officers embarked upon an outrageous course of conduct to physically seize the child from the grandparent, Frances Livingstone, through any means, including the utilization of excessive force.

After Joe Livingstone left peacefully with the police, they forcibly reentered the Livingstone residence, without the permission of the owners. (431a)

Mrs. Livingstone retreated to a back bedroom with her grandson, closing a hallway divider and locking the bedroom door. Defendant Officer Monack and defendant Officer Snyder physically broke down the locked bedroom door in order to gain access to the Livingstones. It is noted that Officer Moody provided a pen to Officer Monack to pick the lock of the door initially. (See 438a, 544a, 545a)

After breaking down the door, defendant Officer Monack physically assaulted Frances, striking her several times, causing her to lose consciousness and sustain numerous bruises, lacerations, teeth knocked out and other injuries to her eye, ear and head. She was struck in such a manner as to become pinned and physically helpless, trapped among the furniture in the bedroom. Additionally, Officer Snyder also struck blows. (See 535a-537a; 546a).

At this point, while plaintiff Frances Livingstone was helpless, stunned and trapped, Officer Monack produced a high voltage "stun" gun. He applied it to Mrs. Livingstone, causing burning and temporary paralysis. Officer Snyder aided in holding Mrs. Livingstone down while the stun gun was applied.

While Mrs. Livingstone remained pinned and helpless, defendant Monack said "you want a thrill, I'll give you a thrill." He then applied the stun gun to an area between Mrs. Livingstone's legs, causing internal burns to her body, including the vaginal area. (540a-550a)

Mrs. Livingstone was handcuffed by the officers and, in view of her paralyzed state, was dragged and carried out of the house. During the course of this, she was dropped and banged her head on numerous occasions.

Mrs. Livingstone was dragged outside of the house, early on the morning of January 13th. While handcuffed and paralyzed, she was left to lay among mud puddles, with the temperatures in the 30's, for an extended period of time without protection.

Defendant Officer Moody went through the Livingstone residence, without warrant or any other color of authority, searching through personal papers, drawers and personal effects of the plaintiffs. (432a)

During the actionable conduct of the defendant police officers, all three officers were supportive and encouraging of the actions of the others. They acted in concert, and took no steps to discourage, halt or prevent the actionable conduct of the other officers. It is noted that the police officers were acting pursuant to an established practice among the police departments. A formal intergovernmental agreement had been entered among the municipalities. (See copy of Agreement at joint appendix, 551a).

The officers testified that the practice under the agreement was to follow the instructions of the officer in whose jurisdiction the activity occurred. (437a; 524a-527a). In this instance, Snyder and Moody followed the lead of Officer Monack in accord with this established policy. Further, Washington Township Chief Matthews testified that the actions of the officers taken at the Livingstone residence were in accord with Washington Township policy concerning intervention in custody matters. (424a-428a).

Chief Matthews was called to the scene, where he observed the Livingstone household damage that night. In the presence of the Livingstones he asked Officer Monack whether charges from any party would be filed. At that time Officer Monack did not respond. (543a)

The next day, township officials began to look into the conduct and evidenced a concern that the Livingstones might sue. (530a-533a; 528a-529a)

Subsequently, Frances Livingstone was arrested and charged with disorderly conduct, aggravated assault, terroristic threats, resisting arrest and interference with custody. These charges were filed on or about January 13, 1969. An FBI investigation was opened into the conduct of the police officers. Officer Monack testified that he made repeated contacts with district attorney Alfonse Lepore, questioning whether he might have civil or criminal liability and whether the charges would continue to proceed against Mrs. Livingstone. (461a-466a)

On or about February 12, 1990, this matter came to trial in Fayette County. The first witness against Mrs. Livingstone called by the state was her daughter, Carrie. The officers then testified to events. A demurrer was granted to the charge of interference with custody on the ground that there were no facts showing danger to the child to justify the police conduct. (428a).

Mr. Livingstone and his son testified in defense. The local newspapers carried coverage of the trial. Supervisor Baker appeared at the trial on the morning of the fourth day and was observed speaking to the Chief and Officers, contrary to Baker's assertions. (554a). Mrs. Livingstone was due to testify where she would tell the story of the assault upon her, including the outrageous application of the stun gun, to the jury and the press. That morning negotiations were initiated by the Commonwealth. They offered to drop the charges, but conditioned the request upon a premise that Washington Township and its police officer not be sued. Mrs. Livingstone has consistently maintained that she never agreed not to sue and that, in fact, from the very beginning, had consulted numerous lawyers concerning her rights in this regard. (540a-542a)) Following discussion, an in camera colloquy was conducted before Judge Chichetti whereby Attorney Ceraso suggested the terms of a proposed agreement. It is noted that the proposal did not include North Belle Vernon and Fayette City, although there was an indication that an offer might be extended to them. The record does not show a clear indication that Mrs. Livingstone specifically knew that she was asked to give up the right to sue. Appendix, 112A-115A.

On or about February 15, 1990, the Honorable Richard Chichetti, of the Court of Common Pleas of Fayette County, granted a motion for a judgment of acquittal on behalf of Frances Livingstone, finally terminating the criminal charges against her. The motion was granted during the fourth day of a jury trial against Plaintiff Livingstone. The effect of the motions was to prevent Mrs. Livingstone from publicly testifying about the extent of the injuries she received at the hands of outrageous police conduct at a time when there was public media coverage of the trial. It is noted that her family had already been torn apart by the prosecution of the charges and by the State's insistence that Mrs. Livingstone's daughter publicly testify against her. At no time during the course of the discussions did anybody offer a rationale for dropping the charges on the fourth day of trial, other than the condition that

Mrs. Livingstone be forced to give up her right to sue. At this late state of the proceedings the family had already been publicly torn to pieces.

Mr. and Mrs. Livingstone signed no release. Shortly after the trial, word was sent back to the township that the Livingstones intended to sue. Mrs. Livingstone obtained a new attorney for a review of the circumstances.

Policy-making and/or decision-making officials of the foregoing municipalities, including the chiefs of police and other municipal officials, encouraged the utilization of criminal process to coerce the surrender of civil rights. More particularly, in this instance, the respective chiefs of police were aware of the instant conduct but encouraged and/or ratified the filing and pursuit of the false charges. Chief Matthews of Washington Township was directly present at the scene and discussed the charges and counter-charges with Officer Monack. (461a-466a). Officer Moody himself was the Chief of Police at the time for Fayette City. The North Belle Vernon Police Chief, in accord with established practice, consulted with the Washington Township Police Chief and approved the charges as well. Further, municipal officials, particularly for Washington Township, specifically sought a civil release in exchange for the withdrawal, dismissal, or dropping of the criminal charges. (473a-475a).

Defendant municipalities have pursued a policy, custom, procedure of failing to properly educate, train or otherwise inform their officers of the basic requirements of law concerning the need for search warrants, arrest warrants, court orders or other legal authority for entry into residences and/or forcing child custody transfers. (See trial testimony of Chief Matthews concerning Washington Township policy at 424a-428a, together with the practice under the intergovernmental agreement whereby all municipality back-up officers "follow the lead of the local jurisdiction" (437a, 524a-527a, also trial transcript, 424a-428a)

Defendant municipalites have pursued a custom, policy and/or procedure of failing to provide appropriate training and/or instruction and/or follow-up in the utilization of force, particularly the application of high voltage stun guns to citizens. The police for all the municipalities admitted that they had received absolutely no training concerning stun gun usage, although their respective departments had provided them with stun guns, other than the instructions that came with the device. (434a-436a).

Defendant municipalities encouraged the instant conduct by failing to take any disciplinary action whatsoever. In fact, the instant wrongful conduct has been further ratified by the promotion of defendant Officer Monack to the position of Chief of Police. (433a). As a result of these failures, defendant municipalities have failed to protect the public, including the plaintiffs, as outlined.

This matter was remanded to the district court by a unanimous en banc Third Circuit in Livingstone v. North Belle Vernon Borough, 12 F.3d 1205 (3rd Cir. 1993) (Livingstone I). The remand was for proceedings on the issues concerning the validity of an alleged release-dismissal agreement.

Shortly before trial, plaintiffs sought to defeat the release-dismissal agreement as a matter of law due to its lack of formal ratification. The lower court granted plaintiffs permission to file a motion for summary judgment on this issue. Defendants countered with a cross-motion which was granted regarding all issues involving the validity of the release-dismassal agreement except for the jury issue of whether the release-dismissal agreement was entered into voluntarily, intelligently and deliberately.

At trial, on this narrow issue, the jury found the alleged waiver to be voluntary. Objections were raised to the evidentiary standard, the exclusion of plaintiffs' expert, the

overruling of the attorney-client privilege, and jury instructions concerning the failure of two of the municipalities to participate.

Following the jury verdict, a motion for new trial and/or judgment n.o.v. and/or motion to alter or amend judgment was denied.

The Third Circuit on appeal upheld the trial court's rejection of Respondent's Motion for Summary Judgment concerning the ratification issue but remanded the matter to determine whether the agreement included two of the townships. It also rejected Respondent's arguments that the attorney Ceraso's testimony should not have been permitted, that expert testimony concerning the validity of the underlying civil rights claim should have been permitted, and that the trial transcript of the criminal trial should have been permitted to be introduced before the jury. In view of the present state of the record, while Respondents disagree with these rulings, it would not appear that they were ripe for review by this Court at this time and Respondents expressly do not waive them by failure to raise them at this time.

As noted above, the Third Circuit did remand the matter to the district court for a determination as to whether Respondents North Belle Vernon Borough and Fayette City Borough were included in the agreement. This issue doe not appear to be included as part of Petitioner's Petition for Writ of Certiorari.

The Third Circuit also remanded the matter for a finding as to whether the prosecutor made a determination that the Livingstones' civil rights claims were marginal or frivolous, and whether this was the real reason for his decision to enter into the agreement. The Circuit Court also reversed the finding of the jury concerning the voluntariness issue and remanded it for a decision with the heightened burden of proof of "clear and convincing evidence." These are the two issues that are raised by the Petitioners in their Petition.

REASONS FOR DENYING THE WRIT

A. This Court should not grant certiorari because the Third Circuit's analysis of the alleged release-dismissal agreement was properly conducted in accordance with this Court's ruling in Town of Newton v. Rumery and is not inconsistent with the decisions of other Circuits.

Petitioners first argue that the court should grant certiorari because the Third Circuit's crafting of a rule that release/dismissal agreements are invalid unless the prosecutor correctly determines that the civil rights claims at issue were "marginal or frivolous" conflicts with this Court's ruling in Town of Newton v. Rumery, 480 U.S. 386 (1987) and decisions of other Circuits.

However, this position completely mischaracterizes the Third Circuit's ruling below, which is fully consistent with Rumery, and is not inconsistent with rulings by the other Circuits.

In Rumery, the Supreme Court rejected the Court of Appeals' determination that release/dismissal agreements were per se unenforceable and that such an agreement could be enforceable if the interest in enforcement is outweighed in the circumstances by a public policy harmed by the enforcement of the agreement. Justice O'Connor, who provided the key fifth swing vote in the case, determined that it was the burden of the defendant to prove that a particular release executed in exchange for the dismissal of criminal charges was voluntarily made, not the product of prosecutorial overreaching, and in the public

interest." [1]

The petitioners find that the analysis by the Third Circuit below conflicts with Rumery in that it sets out a "bright line" or per se rule which was rejected in Rumery. On the contrary, however, the Third Circuit has conducted precisely the analysis required in Rumery. The voluntariness of the agreement was analyzed in depth in the opinion. App. 31A-40A. The court also provided a comprehensive analysis of whether it constituted prosecutorial overreaching and was in the public interest.[2] App. 18A-31A. The Third Circuit did determine after this analysis that based upon its earlier decision in Cain v. Darby Borough, 7 F.3d 377 (3d Cir. 1993)(in banc), cert. denied, 510 U.S. 1195 (1994), the case

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1. There was a four justice plurality in Rumery with a concurrence by Justice O'Connor which determined that the release-dismissal was enforceable. Justice O'Connor felt that it was possible that the plurality in Part III-B of its opinion implied that there was a presumption in favor of the enforceability of such agreements and did not join in that section of the opinion.. Rumery, 480 U.S. at 401. The four dissenting Justices favored a presumption against such enforceability. Id., 418. Thus, the controlling thrust of Rumery is based upon the concurring opinion of Justice O'Connor requiring the three-pronged proof set forth in her decision. Those Circuits of Appeals considering the issue have been interpreting Rumery to require this three-pronged analysis. See, e.g., Berry v. Peterson, 887 F.2d 635 (5th Cir. 1989); Coughlen v. Coots, 5 F.3d 970 (6th Cir. 1993); Woods v. Rhodes, 994 F.2d 494 (8th Cir. 1990); Lynch v. City of Alhambra, 880 F.2d 1122 (9th Cir. 1989).

2. The Third Circuit is handling the three pronged analysis as a two pronged analysis in which the prosecutorial misconduct issue is embedded in the larger inquiry as to whether the agreement is in the public interest. App. 18A.

should be remanded to the lower court for a determination as to whether the prosecutor had considered whether the Livingstone's civil rights claims were marginal or frivolous before concluding the agreement.

In both the Livingstone case below and in Cain, the Third Circuit first analyzed the reasons offered by the defendants and the lower courts concerning the weight given to the various public interests involved. In Livingstone, the court rejected the three reasons offered by the lower court. It gave little weight to the concept that the public interest in further litigation is outweighed by the cost of litigation, since that could be asserted in virtually any case. pp. 21A-22A. Based upon the Rumery Court's rejection of per se rules, it found that such a blanket exception could violate Rumery and required close scrutiny. In Cain, the Third Circuit similarly had rejected the government's blanket assertion that there was a public interest in avoiding "the needless litigation, the oftimes frivolous actions that are brought and to resolve the entire matter at the time of the ARD hearing in an amicable manner." Cain, 7 F.3d at 383. The County below had been requiring all individuals to sign a release/dismissal agreement before being permitted to enter their alternative disposition program. The Third Circuit then remanded the case for a case-by-case determination as to whether the released civil rights claims appeared to be marginal or frivolous at the time the agreement was made, and whether the prosecutor was in fact motivated by that reason.[3]

In footnote 16, in Livingstone, the court made it clear that it was not falling into the blanket or per se rule trap rejected by Rumery. p. 23A. It specifically determined that an exception to the requirement that the prosecutor consider whether the released civil rights claims were marginal or frivolous existed if there were other strong public interests

3. The petitioners here are actually essentially attacking the Third Circuit' decision and ruling in Cain, a case for which this Court has already denied certiorari. 510 U.S. 1195.

which supported the agreement, such as the one that had been present in Rumery. Thus, the frivolous and marginal determination is only required where such other strong public interests have not been identified or demonstrated. The Third Circuit in Livingstone below had merely correctly found that the three public interest reasons asserted by the defendants and the lower court below were not persuasive, and this determination, concerning whether the civil rights claims were marginal or frivolous, would have to be made in order to finally decide the enforceability of the agreement.

Therefore, it is clear that the Third Circuit's decision below was completely consistent with Rumery, and justly, fairly and correctly applied the analysis set out by the Supreme Court in that case, albeit in a way disappointing to the petitioners.

Petitioners also argue that the Third Circuit's decision was inconsistent with that of other Circuits. They cite the Fifth Circuit's decision in Berry v. Peterson, 887 F.2d 635 (5th Cir. 1989), and the Sixth Circuit's decision in Hill v. City of Cleveland, 12 F.3d 575 (6th Cir. 1993) as examples.

However, in Berry, the Fifth Circuit was analyzing a plea agreement in which a prisoner who had been burned by a mattress fire had allegedly agreed to release his civil rights claims regarding the burns in return for dropping of an arson charge and being granted probation on other charges pending against him. Although it involved a plea agreement in which other charges were not dropped,[4] the court there did analyze the matter under Rumery and found that there were strong public interests in favor of the agreement. Unlike in Livingstone, in Berry, the Fifth Circuit determined that the individual still could maintain a claim against the mattress manufacturer and that the

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4. The majority in Rumery distinguished plea bargains from release/dismissal agreements, and applied its analysis to the latter. See footnote 3, Rumery, 480 U.S. at 393.

public was protected in that the charges were not all dismissed, factors not present in Livingstone.

In Hill, the Sixth Circuit also analyzed a release-dismissal agreement under the Rumery analysis. It determined that there was no evidence of prosecutorial overreaching based upon the police officer's affidavit that he did not know of the threat of a civil rights action against him when he preferred the charges, that the written and signed agreement had been judicially approved, and that the conflicting stories regarding the incident made the civil rights action uncertain. Thus, the court clearly did find sufficiently strong public interests in support of the agreement to find it enforceable, interests different from those asserted in Livingstone.

Additionally, this is not the appropriate time for this Court to take on this case. The issues have not yet been completely decided since the case was remanded by the Court of Appeals to the lower court for further action. There is still to be a final determination of whether in fact the prosecutor considered the civil rights claims to be marginal or frivolous, whether the agreement included the other municipalities, and whether voluntariness could be shown by clear and convincing evidence. The Supreme Court's examination, if required, would be much more appropriate and meaningful after such matters have been completely decided. Therefore, the Court should not grant certiorari on this issue.

B. The Third Circuit's application of a clear and convincing evidence burden of proof upon the Petitioners is consistent with this Court's precedent.

The petitioners also request this Court to grant certiorari in order to decide the correctness of the Third Circuit's requirement that voluntariness of an oral release-dismissal agreement be proven by clear and convincing evidence.

Petitioners assert that this burden of proof conflicts with this Court's earlier precedents.

This Court has previously held that a standard of proof greater that one of the preponderance of evidence can be applied in civil cases in which "particularly important individual interests or rights are at stake." Herman & MacLean v. Huddleston, 459 U.S. 375, 389, 390 (1983). The Third Circuit determined that the individual's right to obtain redress for possible violations of constitutional rights was such an important individual interest or right, particularly where the alleged agreement to waive this right was oral and not in writing. As noted by the Third Circuit, the importance of not allowing release-dismissal agreements to encroach on this right was recognized by all nine justices in Rumery.

The right for redress for violations of constitutional rights is at least as important as the rights at stake in other cases where this Court found a clear and convincing evidence burden of proof to be warranted. Santosky v. Kramer, 455 U.S. 745 (1982)(termination of parental rights); Addington v. Texas, 441 U.S. 418 (1979)(involuntary commitment procedures); Woodby v. INS, 385 U.S. 276 (1966)(deportation proceedings).

Petitioners, however, cite Colorado v. Connelly, 479 U.S. 157 (1986) as an example of a case in which a determination of whether the defendant has waived constitutional rights merely requires proof by the preponderance of the evidence. This, of course, is based upon the wholly different criminal context from the civil context here. The Court in that case made it clear that its rejection of a higher standard was that

> "it is very doubtful that escalating the prosecution's burden of proof in ... suppression hearings would be sufficiently productive ... to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence."

Id. 390. This strong countervailing public interest in having relevant evidence go before the fact finders in criminal matters is not present in this case.

The Third Circuit's requirement for clear and convincing evidence is wholly consistent with Rumery. In discussing the evidence, Justice O'Connor in her pivotal concurring opinion stated that the evidence that Rumery voluntarily entered the agreement was convincing. 480 U.S. at 403. The opinion of the Court confirmed that it was clear that Rumery voluntarily entered into the agreement. Id. 397, 398. Thus the Third Circuit's decision is entirely consistent with this Court's precedents and the grant of a writ of certiorari is not warranted.

CONCLUSION

Essentially, the Third Circuit, in finding a heightened burden of proof, and requiring a prosecutor under certain circumstances to determine whether an underlying civil rights claim is marginal or frivolous, is attempting to apply workable standards to an inherently difficult process.

At its core, an attack on the release-dismissal agreement under Rumery will almost always require some form of challenge to the ethical integrity of the prosecutor involved. Trial courts will be reluctant to draw the conclusion that a particular prosecutor may have committed ethical breaches associated with coercing the extinguishment of otherwise protected civil rights by means of the threat of criminal prosecution. Prosecutors will be put on the defensive with their very careers at stake. The public is poorly served by extended litigation of such a magnified threat to its public prosecutors. On the other hand, it appears clearly not the intent of this Court in Rumery to ignore the coercive effects of a civil release in the criminal prosecution context.

The test set forward by the Third Circuit, consistent with

the dictates of Rumery, allows trial courts to quickly and efficiently cut to the root of whether the prosecution tactics were unfair without necessitating a prolonged hearing into the personal ethics of the prosecutor. If the underlying civil rights claims are demonstrably not frivolous to the satisfaction of the trial judge by means of pretrial review, then the matter goes to the jury with the appropriate high burden upon the government.

This is a fair balance of the competing interests in the matter. In any event, the Court is encouraged to permit experience to be gathered under the Third Circuit's approach to ascertain whether these practical tests achieve satisfactory results.

In view of the foregoing, therefore, since the Third Circuit's decision is consistent with the precedent of this Court, does not conflict with decisions of other Circuit Courts of Appeal, is justand rational, and does not constitute such a departure from the accepted and usual course of judicial proceedings as to call for this Court's supervisory power, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the forgoing Brief in Opposition to Petition for a Writ of Certiorari was served by first-class mail on February 3, 1997 on the following:

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